

# Blue Ridge Environmental Defense League

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Via Email & Mail

November 14, 2018

US Environmental Protection Agency  
Office of General Counsel  
External Civil Rights Compliance Office (ECRCO)  
Mail Code 1201A  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
[Title VI Complaints@epa.gov](mailto:Title_VI_Complaints@epa.gov)

Re: Title VI Environmental Justice Complaint against the Virginia Department of  
Environmental Quality

To Whom It May Concern:

The External Civil Rights Compliance Office (ECRCO), within the Office of General Counsel is responsible for enforcing several civil rights laws which, together, prohibit discrimination on the basis of:

- race, color, or national origin (including on the basis of limited-English proficiency)
- sex
- disability
- age

by applicants for and recipients of federal financial assistance from EPA. (Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, respectively.)

It is the duty of ECRCO to ensure that any entity that receives EPA funds comply with federal non-discrimination laws. ECRCO is the EPA program office designed to ensure that recipients of EPA financial assistance and others comply with the relevant non-discrimination requirements under federal law. If a complaint of discrimination is filed with ECRCO against a program receiving EPA funding, ECRCO processes it.

Based on the above stated responsibilities of ECRCO and pursuant to Title VI of the Civil Rights Act of 1964, 42 USC, Part 2000d, now comes Blue Ridge Environmental Defense League (BREDL) and its chapters, Protect Our Water, Concern for the New Generation, No ACP, collectively the “Environmental Justice Groups”, with a complaint against the Virginia Department of Environmental Quality (VADEQ) for discriminatory actions the agency has taken in issuing permits for the proposed Atlantic Coast Pipeline (ACP).

The Environmental Justice Groups allege the VADEQ discriminated on the basis of race in issuing permits and certifications to the ACP as part of the permitting process, and by deferring its permitting obligations to other federal agencies, i.e., the Army Corps of Engineers. The failure of the VADEQ to conduct an environmental justice analysis and assess those environmental justice impacts of the proposed ACP on communities of color along the route led to the improper actions taken by its Water Compliance and Permitting Division, Air Compliance and Permitting Division, and its citizen advisory board, the State Water Control Board (collectively the “State Agencies”). We filed the original complaint within the 180-day requirement based on the issuance of a *conditional* 401 Water Certification in December, 2017. It’s effective date, however, occurred on October 19, 2018 with the approval by VADEQ’s Water Division of the Erosion and Control and Stormwater Management plans, which were conditions imposed by the State Water Control Board in its approval last December. Additionally, the EPA returned our complaint stating it was not “ripe” for consideration and decision because FERC had issued a stop work order. That order was lifted on September 17, 2018. We now refile our complaint within the 60 day timeframe allotted us by the EPA.

As part of this complaint, the Environmental Justice Groups request a prompt and complete investigation of their allegations by the General Counsel and the



External Civil Rights Compliance Office (ECRCO) pursuant to 40 CFR, Pt. 7.120, including a public hearing on the matter in Virginia.

## BACKGROUND

On September 18, 2015, the ACP, LLC, a Delaware limited liability corporation, filed an application under section 7(c) of the Natural Gas Act, requesting authorization to construct, own and operate the ACP, including three compressor stations and at least 564 miles of pipeline across West Virginia, Virginia and North Carolina. Three hundred (300) of those miles will traverse 14 counties in Virginia. The purpose of the proposed ACP is to deliver up to 1.5 billion cubic feet per day of fracked natural gas to customers in Virginia and North Carolina. Those “customers” are subsidiaries of the companies which are partners in the proposed ACP, LLC.

The Federal Energy Regulatory Commission (FERC) has the authority under Section 7 of the Interstate Natural Gas Pipelines and Storage Facilities Act (NGA) to issue a certificate to construct a natural gas pipeline. As described in the Commission guidance manuals, environmental documents are required to describe the purpose and commercial need for the project, the transportation rate to be charged to customers, proposed project facilities and how the company will comply with all applicable regulatory requirements.

As part of its review process, FERC prepares environmental documents, and in this case Draft and Final Environmental Impact Statements (EIS) were prepared and released. The draft EIS (DEIS) was released December 30, 2016. The final EIS (FEIS) was released July 21, 2017. On October 13, 2017, FERC granted a conditional certificate for the ACP, with the most significant conditions based on subsequent actions by State agencies.<sup>1</sup>

The certificate issued by FERC is not final, in that FERC has not ruled on pending motions for rehearing—a necessary step to judicial review—by several parties.

While FERC was conducting its certificate process, the State agencies received and began their reviews of applications from the ACP for various certifications and

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<sup>1</sup> FERC Order Issuing Certificates, October 13, 2017. Available at: [www.documentcloud.org/documents/4108369-FERC-ACP-Order.html](http://www.documentcloud.org/documents/4108369-FERC-ACP-Order.html)

permits.<sup>2</sup> The review and permitting process has extended through two Virginia Gubernatorial administrations. In 2014, Virginia's previous Governor Terrence McAuliffe stood beside Dominion CEO Tom Farrell as he announced the proposed Atlantic Coast Pipeline. McAuliffe called it a "game changer" and an "energy superhighway" which would transform the manufacturing industry in Virginia. The current Governor Ralph Northam was McAuliffe's Lt. Governor. During his campaign for Governor, Northam repeatedly referenced a letter he sent to the VADEQ asking for site-specific analysis to be completed by the VADEQ on both proposed pipelines in Virginia.<sup>3</sup> The letter also asked that the project be held to the highest scientific, and environmental regulations during the permitting process.

VADEQ spokesman, Bill Hayden, made comments on April 6, 2017 to the press and thereby to the public, stating the VADEQ would do its own stream-by-stream analysis of all water and wetland crossings in Virginia.<sup>4</sup> Unknown to the public, on April 7, 2017, the VADEQ issued a request to the US Army Corp of Engineers (ACE) to permit the ACP through its Nationwide Permit 12. The VADEQ allowed the original statements made by Hayden on April 6, 2017, and articles published based on those statements to stand for six weeks until the press then published articles correcting VADEQ's earlier "misstatements."<sup>5</sup>

The public was made aware through those articles that VADEQ would segment its approval processes for 401 water certification by instituting a 401 water certification of its own for the "upland areas" of the ACP... "upland" meaning the mountainous regions. The ACE was asked to permit all waterbody and wetland crossings for the proposed ACP through its NWP12 permit. The VADEQ would further segment the review process by separating the Erosion & Control and Storm Water Management planning processes from the 401 certification. The public hearings on the VADEQ's 401 upland water certification were announced in July 2017 before the Storm Water and Erosion and Sediment Control Plans were

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<sup>2</sup> The applications and permits are available at:

<http://deq.state.va.us/Portals/0/DEQ/Water/Pipelines/ACPCertificate122017.pdf>

<sup>3</sup> [http://appvoices.org/images/uploads/2018/04/Northam\\_to-DEQ-letter\\_02.14.17-1.pdf](http://appvoices.org/images/uploads/2018/04/Northam_to-DEQ-letter_02.14.17-1.pdf)

<sup>4</sup> [http://www.richmond.com/business/virginia-department-of-environmental-quality-denies-backpedaling-on-pipeline-water/article\\_a3ea4db1-8c62-5c6a-ab2e-e076605f5c63.html](http://www.richmond.com/business/virginia-department-of-environmental-quality-denies-backpedaling-on-pipeline-water/article_a3ea4db1-8c62-5c6a-ab2e-e076605f5c63.html)

<sup>5</sup> [https://www.washingtonpost.com/local/virginia-politics/as-gas-pipelines-roil-virginia-governors-race-regulators-backtrack-on-their-role/2017/05/25/4bdb03e6-4160-11e7-8c25-44d09ff5a4a8\\_story.html?noredirect=on&utm\\_term=.77acba6b60ce](https://www.washingtonpost.com/local/virginia-politics/as-gas-pipelines-roil-virginia-governors-race-regulators-backtrack-on-their-role/2017/05/25/4bdb03e6-4160-11e7-8c25-44d09ff5a4a8_story.html?noredirect=on&utm_term=.77acba6b60ce)

even submitted to the VADEQ. Those hearings held by the State Water Control Board were held in August, 2017...still without opportunity for the public to review the E&S and Storm Water Management Plans.

The Army Corps of Engineers issued the NWP 12 permit for the ACP on February 9, 2018. With approval of the State Water Control Board, the VADEQ issued a conditional 401 water certification for upland areas on December 20, 2017. However, the SWCB, at its April 12, 2018 meeting, directed the VADEQ to open a 30-day comment period seeking public input regarding the appropriateness of the ACE Nationwide Permit 12's as the best permitting process for the ACP in Virginia. The VA SWCB held a meeting in August to consider those comments and based on the advice of counsel, after motions to revoke the permits, decided against doing so.

The VADEQ Air Compliance and Permitting Division has issued a draft air quality permit for the ACP's Virginia compressor station sited for the historic Union Hill/Woods Corner community of Buckingham County, VA. Union Hill is a community which was settled by freedmen and whose population today is mostly African American. Additionally, 30 percent of its residents are descendants of those freedmen who settled the community. The State Air Pollution Board (SAPB) held a hearing on September 11, 2018 in Buckingham County and a public hearing on November 8-9, 2018 in Richmond. The SAPB decided to defer its decision on the Air Permit based on site suitability and environmental justice concerns until December 10, 2108.

1. The VADEQ Water Compliance and Permitting Division issued a conditional 401 Water Quality Certification for "upland areas" of Virginia on December 20, 2017. As a part of the Virginia's 401 certification, and at the request of VADEQ, The Army Corps of Engineers issued a NWP 12 permit on February 9, 2018.
2. The VADEQ approved Erosion and Sediment Control Plans, and Storm Water Management Plans for the proposed ACP on October 19, 2018.
3. The VADEQ's Air Compliance and Permitting Division has issued a draft air permit though the SAPB has not yet approved the Air Permit for the proposed ACP's Buckingham compressor station.

4. The SWCB directed the VADEQ to open an additional 30-day comment period on the feasibility of the NWP12 permitting to be the best permitting process available on April 12, 2018. That comment period ended June 15, 2018. The SWCB met in August 2018 to consider these additional comments and though a motion to revoke the permit was made, on the advice of legal counsel the SWCB voted that motion down and allowed the permit to remain in place.
5. Neither the VADEQ Water or Air Permitting Divisions conducted an Environmental Justice analysis of the proposed Atlantic Coast Pipeline as required under Title VI of the Civil Rights Act, or under Virginia's own statutes.<sup>6</sup>

It should be noted that a Memorandum of Understanding (MOU) between the proposed ACP and prior Virginia Governor Terence McAuliffe for \$57.85 million was negotiated in secret and not released to the public until after a similar agreement was made public in North Carolina in January 2018.<sup>7</sup> The MOU pays for mitigation for damages to Virginia's forests and waters. The payments are slated to go to entities outside of the path of the proposed ACP, not directly affected communities. The MOU was signed December 28, 2017...eight days after the VADEQ issued its conditional 401 water certification.

## THE PUBLIC INTEREST GROUPS

The Environmental Justice Groups are not-for-profit corporations acting in the public interest and community groups organized to protect the families and property of their members. The Environmental Justice Groups have members adjacent to or in close proximity to the proposed ACP corridor and blast zone. Many of the members of the Environmental Justice Groups are African-American and/or disadvantaged communities who will face disproportionate impacts of the proposed ACP.

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<sup>6</sup> Email from VADEQ spokesperson, Ann Regn, dated June 14, 2018.

<sup>7</sup> The Mitigation Agreement between the ACP and Governor Terry McAuliffe, <https://s3.amazonaws.com/carolinajournal.com/app/uploads/2018/01/30154905/VA-ACP-Mitigation-Agreement-Dec-28-2017.pdf>

Blue Ridge Environmental Defense League (BREDL) is a regional environmental and social justice organization with at least two chapters with members on the path or adjacent to the compressor station of the proposed ACP. The chapters are: Concern for the New Generation, a mostly African American community group which surrounds the compressor station site for the proposed ACP in Buckingham County, VA; Protect Our Water, a community group in Nelson County, VA; and No ACP, a community group in Richmond, VA.

The Environmental Justice Groups and their members will be significantly affected and aggrieved by the proposed ACP. Many of the economic concerns and environmental impacts affecting the Environmental Justice Groups and their members, and especially those in communities of color, have not been taken into consideration by FERC in its conditional issuance of the Certificate or by the State agencies which failed to complete any environmental justice analysis at all.

The Environmental Justice Groups allege, among other issues, that FERC and the State agencies failed to assess the impacts on families and communities along the route of the environmental and health impacts from the construction and operation of the pipeline, and its cumulative impacts, including the worsening of the climate crisis. The increased usage of fracked gas has aggravated the effects of climate change and the most vulnerable communities along the proposed ACP route are in many cases the same communities being most harmfully impacted by climate change. A study, published in *The Journal of Environmental Health and Science*, states, “The emissions that occur within several miles of residences (sometimes less than 500 feet) pose challenges for health care providers seeing patients from these areas. Health care providers as well as themselves have very little information on the contents of unconventional natural gas development (UNGD) emissions and the concentration of toxics that could be reaching people where they live or work. Currently patients go to physicians with health concerns but are unable to identify chemical or particulate exposures, if they exist. Physicians unfortunately often find themselves with similarly imprecise exposure conceptualizations. Guidance provided by public agencies is often insufficient to protect the health of individuals, yet, there is an increasing amount of data collected on UNGD emissions; and there is existing research on the toxicological and clinical effects of some substances emitted by UNGD activities.”<sup>8</sup> An article in *Scientific American* states, “The generally accepted climate benefit of

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<sup>8</sup> David R. Brown, Celia Lewis & Beth I. Weinberger (2015) Human exposure

natural gas is that it emits about half as much CO<sub>2</sub> as coal per kilowatt-hour generated. But this measure of climate impact applies only to combustion, it does not include methane leaks, which can dramatically alter the equation. Methane is a potent greenhouse gas that forces about 80 times more global warming than carbon dioxide in its first 20 years in the atmosphere. Methane's warming power declines to roughly 30 times CO<sub>2</sub> after about 100 years.”<sup>9</sup> A peer-reviewed study released by the Environmental Defense Fund measuring leaking methane from both conventional and fracked natural gas wells in Pennsylvania indicates the EPA's estimates are woefully inaccurate. The study shows that older conventional wells leak at rate of 23%, and even though there are many more conventional wells, they produce less gas. While the leak rate for the fracked gas wells is considerably smaller at 0.3 percent, their output is so much larger than conventional wells, the fracked gas wells leak nearly as much as the old conventional wells. The study “calculated that fracked wells spewed about 253,500 tons of methane in 2015, and conventional wells, 268,900 tons.”<sup>10</sup>

We also know that the gas transmission and delivery systems leak. The EPA estimates the pipeline systems in the US leak at a rate of 1.3 percent, though recent studies believe the figure to be between 3 to 4 percent. All this leaking methane causes additional health concerns for those unfortunate enough to live along the routes of pipelines and compressor stations and in communities where drilling occurs. The VADEQ's Air Permitting Division admitted at the SAPB hearing on November 8-9, 2018, that it does not regulate or consider methane leaks in its permitting process.

Segmentation of the leaks from natural gas energy infrastructure suits no purpose other than to allow industry to ignore the part they play in global warming. It also offers the industry cover for the detrimental health affects to the environmental justice communities forced to host these toxic, polluting facilities in their communities against their will.

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to unconventional natural gas development: A public health demonstration of periodic high exposure to chemical mixtures in ambient air, *Journal of Environmental Science and Health, Part A*, 50:5, 460-472, DOI: 10.1080/10934529.2015.992663

<sup>9</sup> <https://www.scientificamerican.com/article/methane-leak-rate-proves-key-to-climate-change-goals/>

<sup>10</sup> <https://insideclimatenews.org/news/16022018/methane-leaks-oil-natural-gas-data-global-warming-pennsylvania-edf-study>



Several of the Environmental Justice Groups brought concerns about the impacts on communities of color to FERC in its hearing process and additionally submitted comments and testimony to the State agencies on the permits. The Environmental Justice Groups and their members attended numerous hearings and public meetings on issues related to the ACP and submitted comments on the proposed permits to the agencies. In addition, some of the Environmental Justice Groups held their own public hearings, paying for court reporters, and submitting those comments to the State Agencies because no public hearings were held in their communities. For example, neither the FERC, VADEQ Water Permitting Division, nor the State Water Control Board ever held a public hearing or meeting in Buckingham County, the site for the 57,000 horsepower compressor station for the proposed ACP in Virginia. The VADEQ's Air Permitting Division did hold a public hearing on September 11, 2018 to accept public comments regarding the draft air permit.

Three public hearings were held by the SWCB and VADEQ for its "Upland" 401 water certification which required most citizens to travel more than one (1) hour. The hearings were held in: 1) Harrisonburg, VA (30-plus miles outside of the closest directly-affected community along the proposed ACP route); 2) Farmville, VA (while in Prince Edward County, Farmville is not along the route) and 3) Alberta, VA. Additionally, specific time periods were set for these public hearings and there were many people signed up to speak who were turned away because the State Agencies had not rented the venues for a period long enough to hear all those wishing to make comments.

The State Water Control Board held two days of hearings in Richmond, VA regarding the 401 certification for the proposed ACP in December 2017. The first day was for presentations by the VADEQ and public comment. Public comment went well into the night with many speakers leaving before their names were called. A remark of particular interest to members of the community occurred when the Director of the VADEQ Water Compliance and Permitting Division, Melanie Davenport, said she and the VADEQ had been working with the industry to approve the permits for over 2 years, clearly indicating a bias toward industry. At this point in the process, the VADEQ had failed to complete many of the studies, analysis and reports needed for approval of the proposed ACP to include:

an environmental justice analysis; the karst dye test studies; the E&S and Storm Water Management Plans. At the time, it was estimated they would not be ready for approval until March 2018. The E&S and Stormwater Management Plans were approved on October 19, 2018. To our knowledge, anti-degradation studies, nor sediment load studies were ever completed. Finally, the VADEQ did not complete an environmental justice analysis ever. Michael Dowd, the VADEQ Air Division Director admitted so when questioned by SAPB members at its public hearing regarding the draft air permit on November 8-9, 2018. Mr. Dowd stated, “If all the standards are being met, there is no disproportionate impact,” when questioned about environmental justice and site suitability of the proposed ACP’s proposed compressor station.<sup>11</sup> SAPB member Jennifer Rubin stated during the public hearing, “One of the critical issues when contemplating environmental justice is that equality and equity are two different concepts. So that which may be appear to be equal and even handed ... nonetheless may be inequitable if a population begins at a disadvantage.”<sup>12</sup> Asked if VADEQ had any demographic information on the community, staff admitted they did not.

Through a series of FOIA requests from the Dominion Pipeline Monitoring Coalition and responses by the VADEQ to those requests, the Dominion Pipeline Monitoring Coalition (DPMC) released a report, “The agency has no records...DEQ’s Failure to Use Sound Science to Protect Virginians from Pipeline Threats” on June 5, 2018.<sup>13</sup> The questions asked by DPMC concerned the scientific processes the VADEQ used in its review and recommendation to the SWCB to approve the 401 water certifications for both the ACP and MVP. The answers to the questions were consistently: “The DEQ has no records....”.

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<sup>11</sup> “Questions about ‘disproportionate impact’ on Union Hill move Air Board to delay decision on compressor station permit,” *Richmond Times Dispatch*, November 9, 2018. May be found at: [https://www.richmond.com/news/virginia/government-politics/questions-about-disproportionate-impact-on-union-hill-move-air-board/article\\_13223db9-1a11-5cf2-bf51-765ca320856c.html](https://www.richmond.com/news/virginia/government-politics/questions-about-disproportionate-impact-on-union-hill-move-air-board/article_13223db9-1a11-5cf2-bf51-765ca320856c.html)

<sup>12</sup> “Air Board delays Buckingham compressor station decision,” *Virginia Mercury*, November 9, 2018. May be found: <https://www.virginiamercury.com/2018/11/09/air-board-delays-buckingham-compressor-station-permit-decision/>

<sup>13</sup> May be found here: <http://pipelineupdate.org/wp-content/uploads/2018/06/The-Agency-has-no-records.pdf>



Therefore, in addition to the environmental justice concerns, the Environmental Justice Groups allege the procedures for the issuance of the permits sub judice were not fair and impartial, but instead were biased in favor of industry.

Many of the members of the Environmental Justice Groups live in rural communities which depend on wells and/or springs as their water sources. The construction and operation of the proposed ACP could adversely affect the members of the Environmental Justice Groups water sources through sedimentation, or redirection of ground water sources by the blasting necessary to construct the proposed ACP and/or by the damming effect a 42" pipe buried in the ground could cause. These damages to private wells, cisterns and springs may not be immediately recognized. For example, a reduction in the refill rate of a well, or into a year-round spring could cause it to operate normally during the fall, winter and spring, but become dry in the summer. The Virginia Department of Health advised FERC and VADEQ that a study mapping every well, spring and cistern within 1,000 feet of the centerline of the proposed ACP be completed prior to construction.<sup>14</sup> This was not done. Instead the VADEQ added a condition to its upland 401 water certification that wells, springs and cisterns within 1,000 feet of the pipeline should be mapped in areas with karst terrain. This result leaves families without protection...most of whom live in the counties with environmental justice communities. Further, it is our assertion that the MOU negotiated by previous Governor McAuliffe releases the proposed ACP LLC from damages caused by construction of the proposed ACP to the wells of families along and/or adjoining the path of the ACP and/or its compressor stations. If these wells and/or springs are contaminated, most rural localities do not have municipal water systems for the communities to fall back on, and even if they were available, most of the community members of the Environmental Justice Groups do not have the wherewithal to pay connection fees and monthly water bills.

For those families who have access to municipal water systems, those systems are also being threatened by drilling under water reservoirs and river crossings in source water assessment areas used for municipal water supplies. A study completed by Downstream Strategies, "Threats to Water Quality from the

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<sup>14</sup> Memo, Virginia Department of Health Office of Environmental Services Dwayne Roadcap

Mountain Valley and Atlantic Coast Pipeline Water Crossings in Virginia,”<sup>15</sup> outlines environmental justice threats to several water crossings in Virginia. We include three of those communities here: 1) In Suffolk County, VA, the proposed ACP will use horizontal directional drilling to construct the ACP under two reservoirs. These reservoirs, while located in Suffolk, are owned by the city of Norfolk and are used to provide clean drinking water to its residents. Additionally, the ACP would make 11 crossings of streams and tributaries in the source water assessment area for these reservoirs. Norfolk is a majority minority community with 50.9 percent of the city being other than white.

2) The City of Emporia, located in Greensville County, gets its municipal water from a 220-acre reservoir supplied by the Meherrin River. The reservoir has been categorized by the VDH to be highly susceptible to contamination. The proposed ACP will cross streams and tributaries of the source water for the Meherrin River 16 times. The crossing of the Meherrin River, itself, is upstream from the reservoir and exacerbates contamination concerns. Emporia is an environmental justice community with approximately 5,300 residents, 70.9 percent of whom are African American. The poverty rate for Emporia is 43 percent. Greensville County has an African American population of 59.5 percent and a poverty level of 25.4 percent.

3) The city of Franklin and surrounding communities in Southampton and Suffolk Counties get their drinking water from the Potomac Aquifer. Studies show that the Potomac Aquifer cannot meet the need for current and future users for drinking water in these communities. VADEQ has concerns of salt water intrusion into the aquifer.<sup>16</sup> It has limited the amount large users can withdraw from the Potomac Aquifer and all those users have new permits with the exception of the city of Franklin, which has appealed.<sup>17</sup> The ACP would cross 33 streams within two miles of the city of Franklin. Twenty-three (23) of which are in areas dominated by African Americans with a population above 70 percent who get their water from private wells. There is also a planned horizontal direction drilling

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<sup>15</sup> “Threats to Water Quality from the Mountain Valley Pipeline and Atlantic Coast Pipeline Water Crossings in Virginia,” Downstream Strategies, February 2018, by Evan Hansen, Jason Clingerman & Meghan Betcher

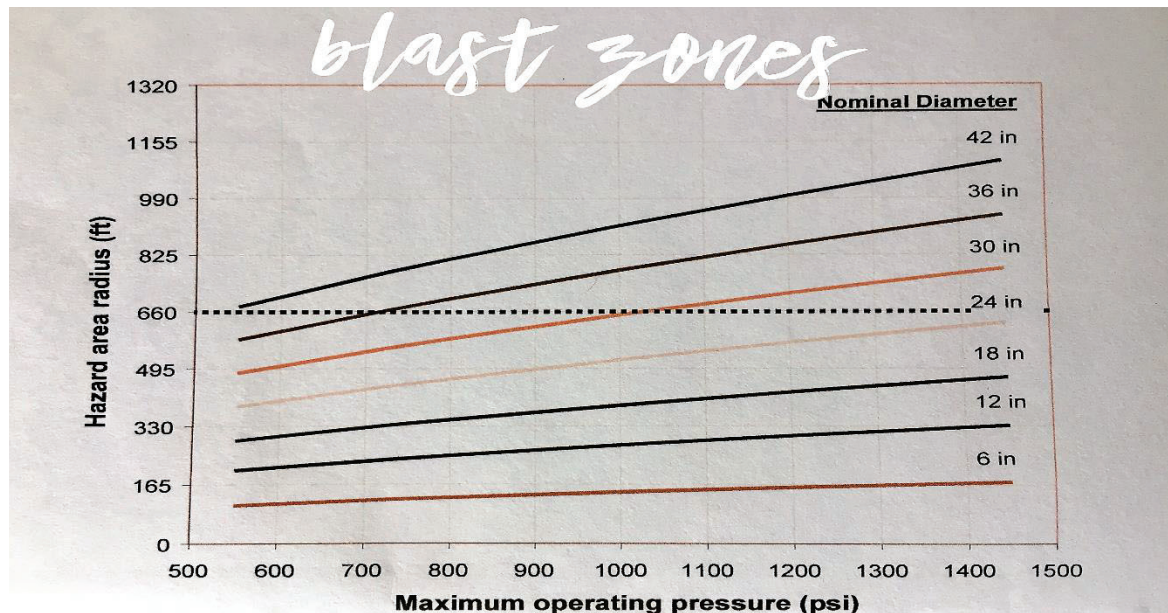
<sup>16</sup>[http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterSupplyPlanning/EVGWAC/GW%20Issue%20Presentati on\\_08%2018%202015.pdf](http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterSupplyPlanning/EVGWAC/GW%20Issue%20Presentati on_08%2018%202015.pdf)

<sup>17</sup> [http://www.fredericksburg.com/news/environment/virginia-tightens-spigot-on-big-water-users-to-stem-potomac/article\\_46dcc766-36f9-5687-a60f-651f97bd6596.html](http://www.fredericksburg.com/news/environment/virginia-tightens-spigot-on-big-water-users-to-stem-potomac/article_46dcc766-36f9-5687-a60f-651f97bd6596.html)

crossing planned for the Blackwater River which could also affect ground water resources in the area. We assert further jeopardizing the water resources of these communities by construction of the ACP is foolhardy at best. Southampton County has a 35.4 percent African American population, while Suffolk County's is 42.6%. We agree clean water is a necessity for all, but we believe the evidence presented herein indicates vulnerable environmental justice communities will be disproportionately affected.

The members of the Environmental Justice Groups allege that the permit decisions would have a significant and adverse impact on the health and well-being of the members of their communities. The siting of the compressor station in the center of historic Union Hill, Buckingham County, VA, a community settled by freedmen with descendants of those freed slaves still living there today, puts a mostly poor, African-American community at a disproportionate risk for increased health issues from the toxic emissions from the compressor station as well as the noise emissions which cause many health concerns. This community will be directly affected by the emissions caused by the planned or unplanned releases and blow-downs. The noise and pollutants emitted from these blow-downs will affect the enjoyment of their property, the value of their property and other economic interests.

Many of the families along the route of the proposed ACP are having their property taken through eminent domain. Though FERC's permit is conditional, it is approving incremental construction of the proposed ACP where permits have been received and landowners have signed easements. For those fighting these easements in the courts, the courts have been, in most cases, allowing immediate access to properties without compensation. Some of the Environmental Justice Groups' members are part of what is commonly referred to as "heired" property. "Heired" property are properties which were at one time owned by an ancestor with no will, and now the descendants of that ancestor own the property together with other heirs who may live all over the country. This puts those landowners at a disproportionate disadvantage in presenting their cases before the courts for receiving just and fair compensation for their interests in these "heired" properties. Additionally, families who live well within blast and evacuation zones, and in the vicinity of compressor stations receive no



compensation or even notification because they do not own land needed by the company to construct the pipeline or compressor station. We have included two charts—a blast zone chart<sup>18</sup> and evacuation zone chart.<sup>19</sup>

<sup>18</sup> A MODEL FOR SIZING HIGH CONSEQUENCE AREAS ASSOCIATED WITH NATURAL GAS PIPELINES Mark J. Stephens, C-FER Technologies, Edmonton, Alberta T6N 1H

<sup>19</sup> <https://pipelineawareness.org/media/1092/2017-pipeline-emergency-response-guidelines.pdf>



## Recommended Minimum Evacuation Distances For Natural Gas Pipeline Leaks and Ruptures

(Not applicable for Butane, Propane, or other Hazardous Liquids)

		Pipeline Size (Inches)											
Pressure (psig)		4	6	8	10	12	16	20	22	24	30	36	42
		91	137	182	228	274	365	456	502	547	684	821	958
100		91	137	182	228	274	365	456	502	547	684	821	958
200		129	193	258	322	387	516	645	709	774	967	1161	1354
300		158	237	316	395	474	632	790	869	948	1185	1422	1659
400		182	274	365	456	547	730	912	1003	1094	1368	1642	1915
500		204	306	408	510	612	816	1020	1122	1224	1529	1835	2141
600		223	335	447	558	670	894	1117	1229	1340	1675	2011	2346
700		241	362	483	603	724	965	1206	1327	1448	1810	2172	2534
800		258	387	516	645	774	1032	1290	1419	1548	1935	2322	2709
900		274	410	547	684	821	1094	1368	1505	1642	2052	2462	2873
1000		288	433	577	721	865	1154	1442	1586	1730	2163	2596	3028
1100		302	454	605	756	907	1210	1512	1664	1815	2269	2722	3176
1200		316	474	632	790	948	1264	1580	1738	1896	2369	2843	3317
1300		329	493	658	822	986	1315	1644	1809	1973	2466	2959	3453
1400		341	512	682	853	1024	1365	1706	1877	2047	2559	3071	3583
1500		353	530	706	883	1060	1413	1766	1943	2119	2649	3179	3709
1600		365	547	730	912	1094	1459	1824	2006	2189	2736	3283	3830
1700		376	564	752	940	1128	1504	1880	2068	2256	2820	3384	3948
1800		387	580	774	967	1161	1548	1935	2128	2322	2902	3482	4063
1900		398	596	795	994	1193	1590	1988	2186	2385	2981	3578	4174
2000		408	612	816	1020	1224	1631	2039	2243	2447	3059	3671	4283
2100		418	627	836	1045	1254	1672	2090	2299	2508	3134	3761	4388
2200		428	642	856	1069	1283	1711	2139	2353	2567	3208	3850	4492

**Table 1 – Evacuation Distance in Feet**

*The applicable leak or rupture condition is that of a sustained trench fire fueled by non-toxic natural gas escaping from two full bore pipe ends. Blast overpressure is not addressed. The distances shown in Table 1 are intended to provide protection from burn injury and correspond to a thermal heat flux exposure level of 450 Btu/hr ft<sup>2</sup>. This is the accepted limit of heat exposure for unprotected outdoor areas where people congregate; as established by the US Department of Housing & Urban Development Code 24CFR51, Subpart C, Siting of HUD Assisted Projects Near Hazardous Operations Handling Conventional Fuels or Chemicals of an Explosive or Flammable Nature. The formula used to calculate distance was taken from the Gas Research Institute Report GRI-00/0189, A Model for Sizing High Consequence Areas Associated with Natural Gas Pipelines, 2001, prepared by C-FER Technologies. The formula is: square root of pressure x nominal pipe size x 2.28. That model does not take into account wind or other factors which may greatly influence specific conditions. Users are advised that the distances shown in Table 1 are considered to be "general information" only and are not intended to replace a site specific risk analysis. The Pipeline Association for Public Awareness makes no warranty with respect to the usefulness of this information and assumes no liability for any and all damages resulting from its use. Anyone using this information does so at their own risk.*

Finally, the Environmental Justice Groups living in rural communities are faced with unequal protection because construction standards are lowered by the class system instituted by the Pipeline & Hazardous Materials Safety Administration's (PHMSA) construction rules.<sup>20</sup> These rules incentivize industry to build in disadvantaged communities of poverty and color because land is cheaper, and construction costs are less expensive. For example, in Class 1, the wall thickness

<sup>20</sup> [http://www.bredl.org/pdf5/Unequal\\_Protection\\_Fact\\_Sheet.pdf](http://www.bredl.org/pdf5/Unequal_Protection_Fact_Sheet.pdf)

of the pipe can be 75 percent less than in suburban and urban areas. Instead of shut off valves being required every 5 miles, rural communities must deal with valves being sited 20 miles apart. Even after construction is completed, maintenance and pipeline inspections are less frequent. The pipeline companies work hard to site these toxic, polluting industrial facilities in rural, agricultural communities which have less than 10 homes per mile to take advantage of rules which ultimately discriminate against people of color and disadvantaged communities. Lastly, though not an enforceable regulation, PHMSA strongly suggests to localities which are forced to host pipelines, that they should create a 660 foot zone on either side of the pipeline which cannot be developed for safety reasons. We must ask then, why are there no construction set back requirements forcing pipeline developers from encroaching on existing homes and businesses?

#### BASIS FOR COMPLAINT

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating on the basis of race, color or national origin in their programs or activities. In this matter, the Environmental Justice Groups allege the State agencies discriminated on the basis of race and color because they failed to assess the disproportionate impacts of the proposed ACP on communities of color.

The State Agencies receive financial assistance from the US Environmental Protection Agency (EPA). The Governor of Virginia's recently approved budget, indicates the State Agencies received approximately \$51,509,235.00 from the EPA. The State Agencies have received similar financial assistance from EPA over the past several years.

Because of the financial assistance from EPA, the State Agencies are required to comply with relevant civil rights law, including Title VI. In her letter of January 18, 2017, to the State Agencies, Lilian S. Dorka, ECRCO Director, presented the US EPA's External Civil Rights Compliance Office Toolkit, which is a clarification of existing law and policy intended to provide guidance to promote and support EPA recipients' compliance with federal civil rights laws.<sup>21</sup>

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<sup>21</sup> [www.epa.gov/sites/production/files/2017-01](http://www.epa.gov/sites/production/files/2017-01)

## ALLEGATIONS OF DISCRIMINATION

In issuing their permits, The State agencies admit they did not address sociological, cultural, historical and demographic issues in order to assess discrimination based on race and color pursuant to Title VI. The Environmental Justice Groups herein use the term “environmental justice” as a shorthand for this discrimination., i.e., a determination of whether the actions would have a disproportionate impact on African American, Native American and other people of color along the proposed route of the ACP.

The ACP conducted a flawed environmental justice analysis in its application process. FERC also failed to conduct a sufficient analysis of its own before issuing its order. These failures are especially troublesome in that the State Agencies have their own Environmental Equity laws. The Virginia General Assembly’s intent in passing the underlying statute clearly states its purpose as, *inter alia*, protecting family life and public health in residential areas. VAC 15.2 §2200.

People from Union Hill, Union Grove and many other communities spoke at public hearings and public comment sessions, providing the County, and thereby the Commonwealth, detailed justification for rejecting the application by Atlantic Coast Pipeline, LLC for a Special Use Permit for its proposed compressor station in Buckingham County, VA.<sup>22</sup>

Virginia law governing energy development articulates support for environmental justice and equitable development. One of the stated objectives in Commonwealth Energy Policy is “developing energy resources and facilities in a manner that does not impose a disproportionate adverse impact on economically disadvantaged or minority communities.” VAC § 67-101 (12). Further, it states that “To achieve the objectives enumerated in [§67-101](#), it shall be the policy of the Commonwealth to [e]nsure that development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse

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<sup>22</sup> For example, detailed comments from Sharon Ponton during the public hearing stated, “The Planning Commission must deny the Special Use Permit application for the compressor station because the Atlantic Coast Pipeline, LLC is not a utility. Therefore, it does not qualify for the public utility exception in the County’s A-1 Zone.”

impact on economically disadvantaged or minority communities.” VAC § 67-102 (A)(11).

During proceedings leading to the approval of a Special Use Permit for the compressor station sited by the proposed ACP in Union Hill community, Buckingham County heard evidence of environmental injustice from local residents and regional organizations during hearings on the Special Use Permit, and ignored their responsibility to protect communities of color and vulnerable populations. Ruby Laury, a resident of Buckingham County’s 6th District, stated:

Many studies have shown that hazardous solid waste facilities, power stations and industrial plants like the proposed ACP compressor station are sited disproportionately in communities of color and low income neighborhoods. Most importantly these plants emit toxic air and noise pollution which would have a negative effect on the health and wellbeing of us living in the Union Hill and Wood [Corner] area....[T]he proposed ACP [site] was owned by descendants of a plantation owner and property sold for \$37,000 + per acre. The community...was created by freedmen, freed slaves in about 90% of the adjoining land.... So please deny the special use permit. Please say yes to the citizens you represent. Say yes to protect us from the environmental racism that appears is being thrust upon us.

John W. Laury, also a resident of Buckingham County’s 6th District, stated in opposition to the Permit, before the Board cut off his statement:

We maintain the compressor station is inconsistent with local ordinances. It is being cited [sic] for an agricultural zone not an industrial zone and it’s surrounded by an African American Community. The local residents and regional organization gave evidence of environmental injustice regarding Union Hill Community during the Planning Commission Public Hearing process. The Planning Commission failed with respect to its legal obligation to ensure the ACP compressor station...(time’s up tone sounded) <sup>23</sup>

A review of environmental justice and equity law by the American Bar Association and the Hastings College of Law revealed the following:

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<sup>23</sup> Buckingham Board of Supervisors January 5, 2017 Public Hearing Transcript at 27.



Poor communities of color breathe some of the least healthy air in the nation. For example, the nation's worst air quality is in the South Coast Air Basin in Southern California, where studies have shown that Latinos are twice as likely as Whites to live within one mile of an EPA Toxic Release Inventory listed facility, and Latinos, African Americans, and Asian populations in the region face 50% higher cancer risks than Anglo-Americans in the region. Advocates nationwide argue that because poor people of color bear a disproportionate burden of air pollution, their communities should receive a disproportionate share of money and technology to reduce toxic emissions, and that laws like the Clean Air Act should close loopholes that allow older, polluting facilities to escape pollution control upgrades.<sup>24</sup>

Walter Fauntroy, District of Columbia Congressional Delegate to Congress, prompted the General Accounting Office to investigate environmental justice issues. The GAO released its findings that three-quarters of the hazardous waste landfill sites in eight southeastern states were located in primarily poor, African-American and Latino communities. United Church of Christ's Commission for Racial Justice published *Toxic Wastes and Race in the United States*, which revealed that race was the single most important factor in determining where toxic facilities were located, and that it was the intentional result of local, state and federal land-use policies. Dr. Robert Bullard published *Dumping in Dixie: Race, Class, and Environmental Quality*, in which he showed the importance of race as a factor in the siting of polluting industrial facilities.<sup>25</sup> We assert that the siting of the ACP in Buckingham, Cumberland, Prince Edward, Nottoway, Dinwiddie, Greensville, Brunswick, Southampton, Sussex, and Chesapeake are blatant attempts by the ACP to continue this historical abuse of communities of color, especially when you consider each of the counties has higher than average minority populations. Many of these communities have large minority

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<sup>24</sup> Environmental Justice for All: A Fifty State Survey of Legislation, Policies and Cases (fourth ed.), Steven Bonorris, Editor, Copyright © 2010 American Bar Association and Hastings College of the Law. With citation, any portion of this document may be copied and distributed for non-commercial purposes without prior permission. All other rights are reserved. <http://www.abanet.org/environ/resources.html> or [www.uchastings.edu/cs/gl](http://www.uchastings.edu/cs/gl)

<sup>25</sup> Natural Resources Defense Council, <https://www.nrdc.org/stories/environmental-justice-movement>

populations because during colonial times their ancestors were enslaved by white plantation owners. After Emancipation, if fortunate, the plantation owners gave their slaves land and those freedmen settled in communities near the plantations they had worked. Others took up share cropping on their prior “master’s” land. Buckingham County, VA is a prime example of this occurrence. Dr. Lakshmi Fjord completed a study of the area surrounding the compressor station site, which indicated 85% of the 99 homes she surveyed within 1 mile of the compressor station were African American. Over 30% of those surveyed were descendants of the freed slaves that settled in the Union Hill community.<sup>26</sup> Additionally, over 70 percent of adjoining landowners to the compressor station site are African-American.

The action of the Board of Supervisors in granting the special use permit in an A-1 (Agriculture 1) District was an unreasonable and arbitrary use of its authority which bore no substantial relationship to the public health, public convenience, or good zoning practice. Rather, it was a discriminatory act for the financial benefit of a private entity and detrimental to residents of the Union Hill community. Therefore, it is unlawful and should be deemed *ab initio* invalid and void. *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967).

We submit that the VADEQ Air Compliance and Permitting Division should weigh the unlawful act of approval of the Special Use Permit by the Buckingham County Board of Supervisors in its air permitting process to ensure both EPA regulations and Virginia law regarding environmental justice is enforced. When speaking before the SAPB, Carlos Brown, Vice President and General Counsel for Dominion stated, “There was no discriminatory intent in the placement of this station.”<sup>27</sup> We believe that to be a statement of admission that a real and valid environmental justice issue exists regarding the placement of the compressor station in Union Hill. Further, Dominion, the night before the SAPB hearing announced a \$5.1 million “community support package” for the Union Hill

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<sup>26</sup> Dr. Lakshmi Fjord, anthropologist, comments submitted to FERC regarding the history and demographic makeup of Union Hill.

<sup>27</sup> “Air Board delays Buckingham compressor station permit decision,” *Virginia Mercury*, November 9, 2018, found at: <https://www.virginiamercury.com/2018/11/09/air-board-delays-buckingham-compressor-station-permit-decision/>

community, as well as Buckingham County. We see this effort by Dominion as a despicable attempt to persuade unwilling residents of Union Hill to bend to its will and as an attempt to influence the SAPB's decision regarding the site suitability and environmental justice concerns of placing the compressor station in the Union Hill community.

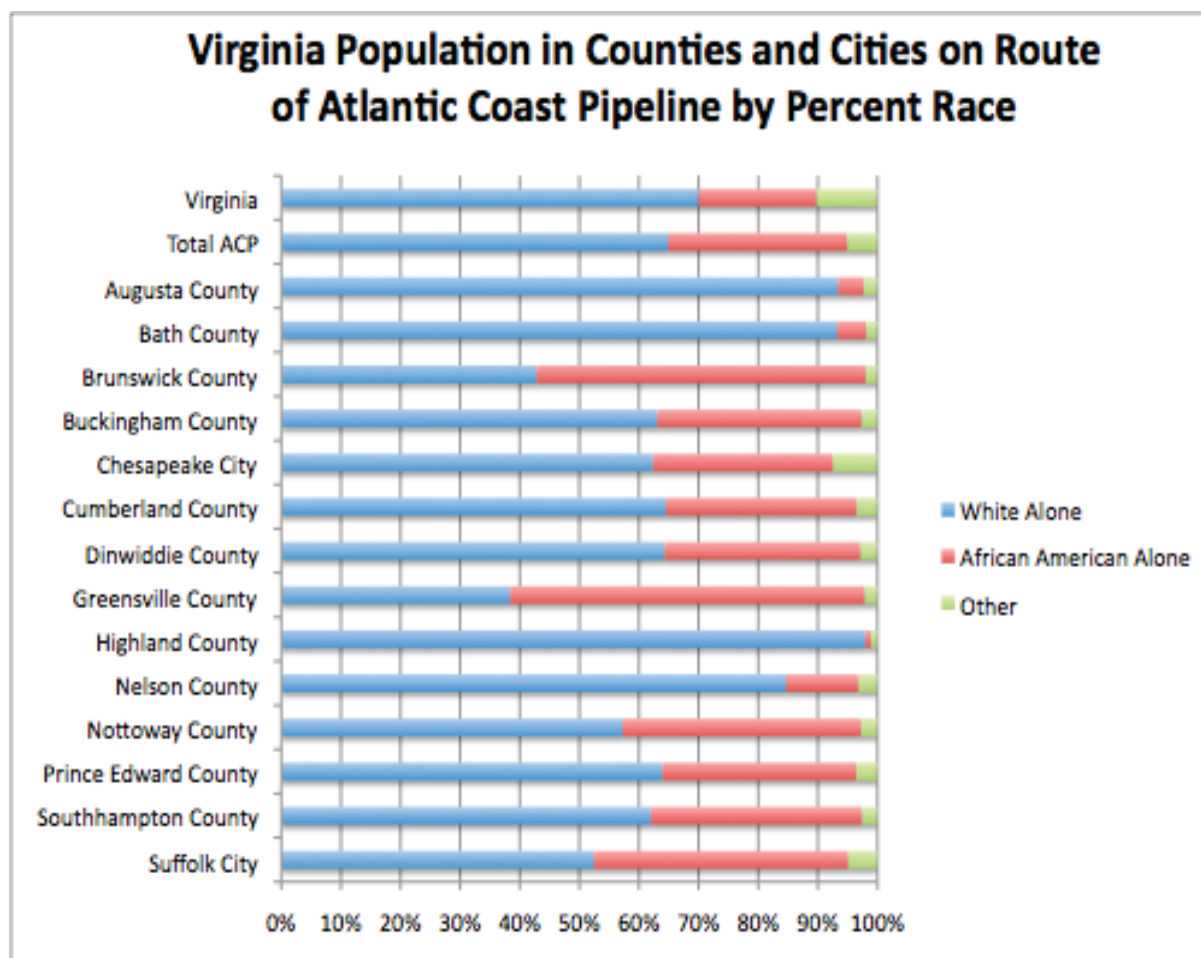
The FERC analysis produced flawed conclusions that systematically discount the disproportionate impacts on communities of color and disadvantaged communities. The State Agencies did not complete an environmental justice analysis at all.

In its Order granting its conditional certificate for the ACP, FERC states it is not required to comply with Executive Order 12898 which mandates that specified federal agencies make achieving environmental justice part of its missions by identifying and addressing, as appropriate, disproportionately high and adverse human or environmental health effects of their programs, policies and activities on minorities and low-income populations. FERC's unsupported position is one of the issues raised by the request for rehearing of FERC's decision by some of the Environmental Justice Groups. FERC's position that it is not required to meet Executive Order 12898 is unacceptable.

Regardless of FERC's flawed position, the State Agencies are required to review the impacts of their decisions on low-income communities and communities of color pursuant to both the EPA directives and Virginia's own environmental justice statutes. The State Agencies certainly cannot simply rely on the ACP/FERC analysis of the Environmental Justice impacts. Even FERC recognizes the ACP would have an impact on low-income families, yet fails to further assess those impacts on these low-income communities and communities of color. Seventeen (17) of the 22 counties through which the ACP would traverse in Virginia and North Carolina have some combination of below median income, with higher than average concentrations of African American or Native American families. The compressor stations in both Virginia and North Carolina are sited in counties with above average minority populations and below average median income. Northampton County, NC is 58 percent African American while the state is 22

percent. Buckingham County, VA is 34.3 percent African American compared to Virginia's 19.6 percent. Governor Northam's Advisory Council on Environmental Justice in Virginia calls the siting of the ACP compressor station in the Union Hill community racist in its recommendations to him regarding the proposed Atlantic Coast pipeline.<sup>28</sup>

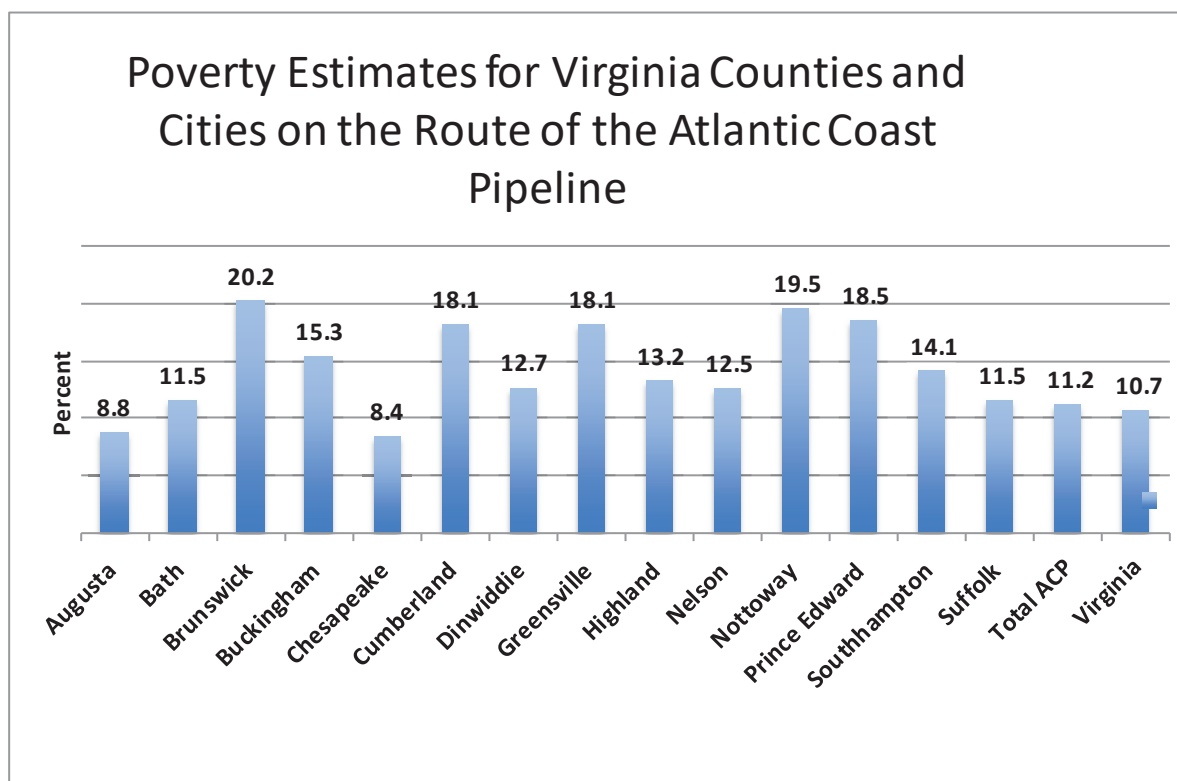
Of the 14 Virginia counties on the route of the ACP, ten (10) have higher than average populations of African Americans—the lowest is 30.2 percent and the highest is 59.5%. (See chart.) Thirteen (13) of the 14 Virginia counties have higher



than average populations living in poverty. Virginia's poverty population is 10.7%; the 14 counties range between 8.4 percent and 20.2 percent. Twelve (12) ACP counties are above the 10.7 Virginia standard. These trends continue into North Carolina into seven of the eight counties along the route of the ACP. We do not

<sup>28</sup> Governor's Advisory Council on Environmental Justice meeting regarding recommendations to the Governor on Pipelines, May, 31, 2018

believe the path and the statistical facts included herein happened by coincidence.



Notably, although FERC's study appropriately compares poverty data in census tracts within one mile of the pipeline corridor to poverty data for the State as a whole, when it comes to population percentages for communities of color, FERC compares census tracts near the pipeline only with the percentage of minorities in the county in which the census tract is located. This dilutes the data and makes it nearly impossible to ever designate any community as an environmental justice community. Since most of the Virginia counties along the proposed ACP corridor have communities of color significantly above the State average, this decision greatly minimizes the disproportionate impact. The decision to use county-level reference statistics for race and ethnicity left regulators unable to determine whether any pipeline route through these specific counties would place a disproportionate burden on minority populations when compared to the broader population of Virginia.

We also assert using Census data alone—as the sole variable in judging whether there is a disproportionate impact on communities of color—lacks reason and forethought. Rural communities have vast amounts of undeveloped land and yet FERC is silent on the taking of undeveloped land from landowners of color. Obviously, census data only reflects the people who live in homes on developed land. It does not reflect who owns undeveloped tracts in those same communities. BREDL has many examples of undeveloped lands owned by members of minority communities in Virginia which are being taken by the proposed ACP—parcels of land within those same census tracts which indicate an above average population of people of color. The impact of these takings on African American, Native American and other people of color are not reflected in any way in the ACP/FERC analyses. These undeveloped parcels are an important part of the heritage and culture of the impacted communities and should be considered in any environmental justice analysis. We have included below a color-coded map of the area around the Buckingham County compressor station to indicate the number of minority owned properties in this community. The compressor station site is blue; yellow, minority owned; green, caucasian; pink, timber companies; and those left white we could not discern the ethnicity of the owners.





According to census data, there are 563,358 Virginians in the 14 counties through which the ACP is proposed to pass. If we use the overall minority population of the state, 19.8 percent, to determine our baseline, we find 110,418 in the 14 counties should be people of color. However, reality on the ground tells a completely different story—thirty-five (35) percent, or 197,654 Virginia residents are members of minority communities in those 14 counties—an increase of 79% over the state baseline of 110,418.

Virginia has a total of 132 counties and cities. Of those 132 jurisdictions, 31 have minority populations greater than 30 percent. Ten (10) of those 31 counties (32.25 percent) are ACP counties.

The NAACP report, “Fumes across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities, November 2017”, documents the health and safety impacts of compressor stations on public health.<sup>29</sup> Additional studies available include: Physicians for Social Responsibility<sup>30</sup>; and a BREDL technical document specific to the compressor station for the proposed ACP in Buckingham County.<sup>31</sup> Many residents in poor, rural communities are medically underserved. Diabetes, asthma and other conditions increase their susceptibility to more severe responses to methane leaks along pipeline routes and increased toxic emissions from compressor stations. Suzanne Keller, a retired (2017) epidemiologist recently presented research indicating the average ambient air standards which the air permit must meet are not “protective” of public health because the averages do not tell a complete story.<sup>32</sup> The releases of toxic emissions don’t occur as “averages,” they spike when there is a problem and during scheduled blowdowns. While prolonged exposure from the day-to-day operations of pipelines and compressor stations are detrimental to public health, those periods of high emission releases cause tremendous health consequences to community members. While, the

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<sup>29</sup> [www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line\\_NAACP\\_CATF.pdf](http://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf)

<sup>30</sup> *Too Dirty, Too Dangerous: Why Health Professionals Reject Natural Gas*, A Report by Physicians for Social Responsibility, November 2017

<sup>31</sup> *Buckingham Compressor Station, Atlantic Coast Pipeline, Pollution Report, Unfair, Illegal and Unjust*, Blue Ridge Environmental Defense League, December, 2016

<sup>32</sup> Suzanne Keller presentation, Governor’s Advisory Committee on Environmental Justice, May 30, 2018

proposed compressor station may meet ambient air standards that are measured in years, the health of individuals exposed to intense episodic releases will not be protected.

In FERC's disregard of the meaning of environmental justice, it asserts that because impacts may be happening in low population areas, fewer people would be hurt. Therefore, it cannot see evidence of disproportionate impact. As noted, FERC's order 255 concludes "these impacts would occur along the entire pipeline route and in areas with a variety of socioeconomic background." We assert simply because rural areas have low concentrations of population does not mean people of low income and/or people of color would not be disproportionately impacted. Reality on the ground tells us, the counties along the path of the proposed ACP have a 79% higher concentration of minority population than the Commonwealth's 19.8 percent. Moreover, the impact of the proposed compressor station will be felt by a majority African American population.

As has occurred in North Carolina, the methodology used by FERC and the ACP fails to identify the major impacts on people of color, whether African American, Native American or another minority. Ryan Emanuel's letter published in Science Magazine outlines how data show in North Carolina, some 30,000 Native Americans live in census tracts along the route, yet FERC and the ACP claim there is not an environmental justice issue in those communities.<sup>33</sup>

The methodology used by the FERC, ACP and State Agencies fails to compare the currently preferred route with other alternative routes. The only major route alterations occurred because of the insistence of the United States Forest Service in protecting endangered species. While we sincerely appreciate and support the efforts of the USFS to protect endangered species by requiring the pipeline be moved, we assert the same concern and protection should be afforded human health and safety. FERC simply concluded the preferred route has no disproportionate impacts on environmental justice families. It comes to this faulty conclusion by counting the number of census tracts with "meaningfully

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<sup>33</sup> Emanuel, Ryan, Flawed Environmental Justice Analyses, Science Magazine, July 21, 2017



greater” minority populations than the county in which those communities are located.

Compounding the failure of a proper environmental justice analysis by the State Agencies, FERC and the ACP refused consultation with tribal councils along the route of the ACP. The cursory attempts to interact with Tribal leaders seemed to be more of an attempt to simply check a box on a step needed to move forward, rather than meaningful consultation. Additionally, six tribes in Virginia received federal recognition by the US government in March, 2018. These tribes should receive the consultation on tribal sites, and cultural and environmental resources known by their members and it should occur as an integral part of the review process.

The ACP, FERC and the State Agencies failed when they attempted to disguise a major interstate project by breaking it into a series of county-level projects to dilute and minimize the impact of the project on communities of color and disadvantaged communities. We assert it is reprehensible behavior and erodes confidence by members of the public that the permitting processes used are fair, scientific and transparent. The ACP, FERC and State Agencies must be held to the highest standard in their permitting processes. Anything less is irresponsible and an affront to the public trust.

## REMEDY

The only just remedy is for the permits to be voided until such time as a thorough environmental justice analysis is conducted to determine the true impacts on communities of color and those living in poverty along the path of the proposed ACP. The new analysis should include:

- 1) A complete study of the households within a 1 mile-radius of the proposed ACP and its compressor stations of African American and other minority populations which is compared to state averages, not county level data.
- 2) A study of the undeveloped tracts of land being taken by eminent domain that are owned by African Americans and other minority populations within

the communities which have higher than state averages of people of color along the path of the proposed ACP is completed.

### **CONCLUSION**

Pursuant to 40 CFR Part 7.120(d), it is our understanding ECRCO is required to notify us within 20 calendar days of acknowledgement of this complaint and your subsequent actions regarding it.

Respectfully submitted,

**Ex. 6, 7c**

BREDL Stop the Pipelines Ex. 6, 7c

Ex. 6, 7c .

Lovington. VA 22949

**Ex. 6, 7c**

cc: The Honorable Ralph Northam, Governor of Virginia  
The Honorable Mark Herring, Attorney General of Virginia  
Matthew Strickler, Secretary, Virginia Division of Natural Resources  
David Paylor, Director, Virginia Department of Environmental Quality

COMPLAINT  
OFFICIAL REQUEST A TITLE VI INVESTIGATION

Official Communication to:

Administrator, Lisa Perez Jackson and or acting Administrator

Gwendolyn Keys Fleming, Regional Administrator

A. Stanley Meiburg, Deputy Regional Administrator

Jerome Balter Director Environmental Law Project

EPA Administrative Law Judge

EPA Administrator Haylan Ford

EPA Millan Hupp

EPA Lynnette Horner

Major General Todd Semonite, Deputy commanding general of the US Army Corps of Engineers South Atlantic Region

10/23/18

*Received  
NOV 01 2018  
F. Fleming*

RE: IN CONSIDERATION OF THE FREEDOM OF INFORMATION REQUEST ACT (FOIA) OR THE MANDATED PROCESS OF THE OFFICE OF HEADQUARTERS AND REGIONAL DIVISION AND OR THE GEORGIA OPEN RECORDS ACT (GORA)

I JEx. 6, 7c Pascagoula, Mississippi 39567 U.S.A. a CITIZEN OF THE UNITED STATES OF AMERICA email: fEx. 6, 7c Ex. 6, 7c  
Officially request a title VI investigation against:

1. State of Georgia  
C/o Governor Nathan Deal
2. Georgia Department of Natural Resources  
C/o Commissioner Mark Williams
3. City of Atlanta  
C/o Mayor Keisha Lance Bottoms
4. City of Atlanta  
C/o Chair Public Safety Committee Dustin R. Hills
5. City of Atlanta  
C/o City Council President Felicia A. Moore
6. City of Atlanta  
C/o City Attorney Nina Hickson
7. City of Atlanta  
C/o Department of Public Works Commissioner James A. Jackson jr.

Violations under Title VI: AIR, WATER, LAND, HAZARDOUS WASTE, And  
WASTE ENDANGERMENT TO PUBLIC SAFETY & HEALTH & FRAUD

8. Environmental Protection Division of Georgia Department of Natural Resources  
C/o Director Richard Dunn

VIOLATIONS UNDER TITLE VI AIR, WATER, LAND, HAZARDOUS WASTE,  
WASTE AND ENDANGERMENT TO PUBLIC SAFETY & HEALTH & FRAUD

9. Fulton County, Georgia Board of Commissioners  
C/o Natalie Hall District 4
10. Georgia Senate Natural Resources Committee  
C/o Committee Chair Tyler Harper
11. Georgia Committee on State Institutions and Property  
C/o Committee Chair Ed Harbison
12. Georgia Environmental Protection Division Chief Watershed Protection Branch  
C/o James Capp

**Reference Points for this Complaint:**

Office of Environmental Accountability  
Office of Policy and Management  
Office of External Affairs  
Resource Conservation and Recovery Act Division  
Science and Ecosystems Support Division  
Emergency Planning and Community Right-to-Know Act  
Environmental Protection Agency Air Emissions  
18 U.S.C. 4  
Superfund Division  
Water Protection Division

- The Georgia Environmental Protection Division is under the Georgia Department of Natural Resources. There is and has been an amalgamated cabal effort of discrimination based on race, color and financial ability of residents and property owners in Northwest Atlanta adjacent the Gun Club Landfill and in close proximity to the City of Atlanta's New Atlanta's West Side Park at Bellwood Quarry where the two (2) Billion water reservoir will hold Atlanta's drinking water, the Procter Creek which is the tributary to our nations waterway Chattahoochee River Atlanta, Georgia 30318 and its tributaries which provide water for human consumption, agriculture, fish and game etc. *are intentionally being contaminated by a local government the City of Atlanta Municipality*. United States Citizens properties are intentionally being contaminated by the same in continuous efforts that allow unlawful solid and hazardous waste to remain in violation of State of Georgia Law and the Laws under the United States Environmental



Protection Agency. This group effort has been systematically perpetuated by and through the double standards or two sets of rules practiced by the Georgia Environmental Protection Division as to punitive and notification measures taken against private individuals, private companies and or private citizens in comparison to the same set of rules and laws in place the practices and or actions as to punitive or notification procedures taken against a local government agency (Municipality City of Atlanta). This scheme and the blatant causatum are against the protected activities of the United States Citizens and are in complete violation of Civil Rights & Liberties, United States Constitutional Rights and the Constitution of the State of Georgia.

- The discrimination, double standard and blatant disregard to Public Safety and Health is depicted driving down the City of Atlanta's streets Sizemore Ave NW, Alvin Dr NW, Ruth St NW, North Ave NW, Mack Dr NW and Gun Club Rd. NW by the Municipality City of Atlanta and the Georgia Department of Environmental Protection Division as to allowing such blatant violations of State and Federal Laws in as much as this area is predominately populated by low income black residents, which have never had their voice considered, it is obvious that this section within the City of Atlanta adjacent the non compliant Gun Club Landfill is just an extension to the landfill as to allow so many open illegal hazardous and toxic waste dump sites. The local Atlanta Police Department just turns a blind eye, the employees of the City of Atlanta just turn a blind eye as if these conditions of public endangerment are not only allowed continuously but are acceptable as normal. The only foreseen motive is one of two obvious reasons, the City of Atlanta is corrupt and has abandoned this area for reasons of driving out the remaining few black residents and private property owners or for LIABILITY reasons as to not being caught and having to defend themselves in court from their inability to follow the laws in place to protect the public, protect the environment and property.

Various United States of America Grants and Funding(s) are presented and issued to the State of Georgia for the assurance and use in as much that violations of Federal and State environmental protection laws will not be tolerated but enforced, in addition the State of Georgia is also the recipient of other federal agencies funding such as NOAA, SUPERFUND, Emergency Planning and Community Right-to-Know Act Awards etc..... In Accumulation of following the money, the City of Atlanta Municipality (Local government) is the recipient of Numerous State of Georgia and Federal Fund awards as example the Scrap tire program, Procter Creek revitalization, Brownfield's Awards etc..... These meliorations are and have been misappropriated by the Local government City of Atlanta and by the State of Georgia along with other agencies within the State for years and have not been used to assure enforcement, complete and full disclosure and allowing ethical violations and professional misconduct to be the measurable action that controls the outcome as to protection of the Public, Environment and Property.



To the point, each level of the Government actual goal is the protection of another level of government with the systematic approach that governs investigations, enforcement and produces deception and non transparency as example, The State of Georgia Environmental Protection Division receives a Waste in Place violation complaint CTS# 78390, the first re-action by the State Government EPD is to immediately investigate and verify actual illegal waste in place, a BIASED determination is made first, whether the Violation is on private property or on government property, if the illegal waste is on private property immediately without any form of communication a Notice of Violation is issued to the private individual without any direct communication effort or meeting, YET, if there is verifiable illegal waste in place on a government property as a Municipality property or City Streets Right of Ways (City of Atlanta for example), every effort and action is in contrary as to how the private citizen was treated in the issuance of a WRITTEN Notice of Violation, phone calls are made to the City, multiple conversations take place with the City , multiple meetings take place with the City and yet still NO NOTICE OF VIOLATION IS ISSUED TO THE CITY even though there is verifiable illegal waste in place in violation of State and Federal Laws so that continuous and repeated contamination of the environment, nuisance to the public and the destruction of the environment and property is allowed by the State of Georgia as well as the City of Atlanta government.:

Georgia Department of Natural Resources, Department of Transportation, Department of Revenue etc...

The lack of enforcement of Federal and State laws, Policies and Procedures Management by the State of Georgia and the City of Atlanta, Fulton County agencies as to Public Health, Safety and our Environment in Georgia concerning absolutely all federally funded programs through the EPA and other federal funding sources under the prognostication of the EPA and by the State of Georgia, County and local government are and have been in violation in the City of Atlanta Northwest Sector adjacent the Gun Club Landfill permit # ( 060-026D (SL) Fulton County, City of Atlanta, Georgia 30318 USA daily.

The Act as Resource Conservation and Recovery Act, Comprehensive Environmental response Compensation and Liability Act does not nor has invariably received the proper appropriated funding for the abundance of violations of federal and state environmental laws in Northwest Atlanta adjacent the non compliant Gun Club Landfill where huge numbers of illegal open waste dumps are and have been operated for years by the City of Atlanta in the City of Atlanta's Streets right of ways, on City of Atlanta's properties and on City of Atlanta Park property called the Baby Gun Club Park on any level toward the protection of our countries natural resources and or the environment surrounding the City of Atlanta's owned and operated Gun Club Landfill and its illegal open dump sites surrounding it.

Federal **open records laws**, such as the Freedom of Information Act (FOIA), provide access to government documents and public **records**. State "sunshine" **laws** and the



Georgia open records Act (GORA) also provide the means by which the public can gain access to government documents and scrutinize the behavior of public officials.

On September 2018 an official Georgia Open Records Act request to the Georgia Department of Natural Resources Environmental Protection Division (GA EPD) in which Linda Weglewski, Georgia open records Act Coordinator responded in an official letter dated September 20, 2018 that "these files were available for inspection." On 9-21-2018 inspection of the partial files offered by the GA EPD, emails, notes, photos, text messages, recordings etc were not provided, the inspection did reveal only seven (7) complaints (Thousands of TONS of illegally dumped waste remains in illegal open dump sites surrounding the non compliant Gun Club Landfill that demonstrated has been in place for years) only seven (7)) complaints exist in the GA EPD office as to the GORA request as Complaint Tracking System CTS#s: 78929, 79508, 78390, 78930, 81276, 77489, 78928 as all opened, Approved/Closed cleaned. These complaints do not reflect the actual real accurate and trustworthy complaints from the black residents who are forced to live in the squalor as to the abundance of tons of Solid, hazardous waste and the longevity these illegal open dump sites have existed after being brought to the attention of the Georgia Department of Natural Resources Environmental Protection Division regarding the City of Atlanta's Right of Ways, Sizemore Ave NW, Gun Club Road NW, Alvin Drive NW, Ruth Drive NW Mack Drive NW, City of Atlanta's properties and City of Atlanta's Park Property Gun Club Park as example. It demonstrates that the Georgia Department of Natural Resources is in desperate need of direct federal occupation since the current laws in place do not afford the proper protection as to the environment and public safety health and protection of property.

The Georgia GAEPD Land Division under the GORA request did not provide emails, Meeting Notes, Field Notes, Text messages, Photos etc as it related to the aforementioned complaints, that an additional request provided to GAEPD employee Esther Alexander on 9-21-2018 stamped RECEIVED ON SEP 21 2018 as to the complaints regarding the GAEPD employees: Larry Castelberry, Brian Boutelle, Russell Nix, Angel White, William Cook, Karen Buerki, Wallace Reid, Jerry Campbell, Jim Cooley, Tammy Smith, Karen Stone and Jamie Lancaster along with any communications relating to the aforementioned complaints in contact with City of Atlanta employees: Carla Lipscomb, City of Atlanta Commissioner, City of Atlanta City Attorney (s), City of Atlanta Mayor Reed and City of Atlanta Mayor Bottoms. The Georgia GAEPD did not provide the full and complete records as required by law since each and every complaint aforementioned was opened, investigated and closed there would be absolutely no reason why all records would not be available under GORA. There was a verbal disclosure by employee that emails and notes may have been deleted or destroyed.

What motives exist for the non-disclosure of public records unless fraud, abuse and or illegal activities are being concealed?

The Water protection and Land protection in Northwest Atlanta that impacts our nations Waterway Chattahoochee River which multitudes of the public depend on this water

way's quality as for use of human consumption, use in agriculture needs fish consumption and wildlife habitat all depends on the protection of the environment.

On this day Wednesday October 24, 2018 I, Ex. 6, 7c, a United States Citizen request an immediate and through investigation concerning the quality of life as to the Environment, Public Safety, Health and Property in the City of Atlanta, northwest section area code 30318 area surrounding the Gun Club Landfill as to Title VI as a process of remediation as covered by State and Federal Constitution.

CC:

- US EPA, Office Civil Rights (1201A) 1200 Pennsylvania Ave NW Washington, DC 20460 202-564-7272 Fax 202-565-0196
- U.S. Environmental Protection Agency Office of Administrative Law Judges Franklin Court, Suite 350 1099 14<sup>th</sup> St NW Washington DC, 20005

Reverentially,

**Ex. 6, 7c**

Ex. 6, 7c Pascagoula, Mississippi 39567

**Ex. 6, 7c**

Email: Ex. 6, 7c



b(6) Privacy

RECEIVED  
NOV 01 2018  
F. Newey

U.S. EPA Office Civil Rights  
(1201A) 1200 Pennsylvania Ave NW  
Washington DC 20460



FCL2128247



GULFPORT MS 395  
26 OCT 2018 PM 2 T



**Harrison, Brenda**

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**From:** Dorka, Lilian  
**Sent:** Tuesday, June 4, 2019 9:17 AM  
**To:** Covington, Jeryl  
**Cc:** Rhines, Dale; Harrison, Brenda; Nieves-Munoz, Waleska  
**Subject:** FW: Complaint Under Title VI of the Civil Rights Act Against NMED on the WCS DP-1817 public process  
**Attachments:** WCS-Title-VI-Complaint\_6-3-19\_Final.pdf

Thanks Jeryl. Copying Brenda and copying Waleska FYI.

Lilian Sotolongo Dorka, Director  
External Civil Rights Compliance Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
202-564-9649 - Office  
202-695-9888 - Cell

**From:** b(6) Privacy  
**Sent:** Monday, June 3, 2019 1:45 PM  
**To:** Title VI Complaints <Title\_VI\_Complaints@epa.gov>  
**Cc:** b(6) Privacy

**Subject:** Complaint Under Title VI of the Civil Rights Act Against NMED on the WCS DP-1817 public process

To Whom It May Concern:

Attached, please find our Title VI Complaint that we are filing today against the New Mexico Environment Department (NMED) for its actions in the public process for the Waste Control Specialists LLC (WCS) application for a groundwater discharge permit (DP-1817) and for a continuing pattern and practice of discrimination in NMED's programs and actions.

We will soon upload all Exhibit documents to a download site whereupon we will email you the link to download those documents. We will also mail signed hardcopy of this complaint along with the Exhibit documents on a flash drive.

We would appreciate it if recipients of this email would confirm receipt of the cover email and the attached document.

Sincerely,

b(6) Privacy



BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

**BEFORE THE ADMINISTRATOR**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**WASHINGTON, D.C.**

Citizens for Alternatives to Radioactive Dumping;	)	
Alliance for Environmental Strategies;	)	
Concerned Citizens for Nuclear Safety;	)	
Ex. 6, 7c and Ex. 6, 7c	)	COMPLAINT UNDER TITLE VI
	)	OF THE CIVIL RIGHTS ACT OF
	)	1964, 42 U.S.C. §2000d AND
	)	40 C.F.R. Part 7
COMPLAINANTS	)	
	)	

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**I. INTRODUCTION**

Citizens for Alternatives to Radioactive Dumping ("CARD"), the Alliance for Environmental Strategies ("AFES"), Concerned Citizens for Nuclear Safety ("CCNS"), Ex. 6, 7c, and Ex. 6, 7c (collectively "Complainants"), through their undersigned representative file this administrative complaint with the External Civil Rights Compliance Office ("ECRCO") of the United States Environmental Protection Agency ("EPA") for an investigation into violations of Title VI of the Civil Rights Act of 1964 by the New Mexico Environment Department ("NMED") with regard to its handling of the public process and the application of Waste Control Specialists ("WCS") for a groundwater discharge permit ("DP-1817") and with regard to a broader pattern and practice of continuing discrimination throughout NMED in permitting and other activities.



Complainants are so-called "minority" members or have minority membership in their organizations, many of whom live, work and recreate in the general area of the discharge from the WCS facility. CARD and AFES were parties in the hearing for the facility; they, along with CCNS, as groups, many of their members as individuals, and other Complainants have actively opposed WCS and its discharge permit or have struggled to ensure NMED issues a discharge permit that is truly protective of potentially impacted New Mexico groundwater—some beginning these efforts within a few months of WCS's December 17, 2012 Notice of Intent to Discharge and others more recently. Complainants therefore petition for an investigation as Complainants who have opposed this facility during the permitting process and who have suffered the effects of NMED's discrimination.

Complainants allege that NMED's public permitting process for the WCS DP-1817 permit amounted to disparate treatment of limited English proficiency ("LEP") individuals in that they were not provided the same critical information relating to the permitting process that was provided to English speakers. This resulted in a disparate effect on these individuals, limiting their ability to participate meaningfully in the permitting process.

Additionally, complainants allege that there is a broader pattern and practice of disparate treatment of and effect on LEP individuals and community members of Hispanic and Mexican descent. In an Informal Resolution Agreement ("Resolution Agreement" or "Agreement") between NMED and EPA, NMED agreed to provide LEP community members with equal and meaningful access to its services and activities as well as to involve communities of Hispanic and Mexican descent in the permitting process and address their needs and concerns.<sup>1</sup> However, in multiple permitting processes, NMED is failing to provide critical information to LEP individuals, involve communities of Hispanic and Mexican descent or to address their needs and concerns. As a result, NMED is failing to provide these individuals with equal and meaningful access to its services and activities.

Finally Complainants allege that NMED has a broader pattern and practice of permitting facilities and discharges in areas of the state with high concentrations of LEP and minority community members. Sometimes, as in the case of the WCS discharge permit, a permit is approved without requiring protections that are standard in permits elsewhere in the state.<sup>2</sup> Minority groups in these areas are already overburdened with multiple environmental stressors, poor health and high death rates—specifically in southeastern New Mexico.

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<sup>1</sup> Informal Resolution Agreement, New Mexico Environment Department and the US. EPA 11-12 (Jan. 19, 2017)

<sup>2</sup> Findings of Fact and Conclusions of Law submitted by CARD and AFES in the matter of the Application of WCS for a Groundwater Discharge Permit, GWB-18-11(P) 2-9, October 19, 2018 (provided in a file as "Exhibit 2")



## II. JURISDICTIONAL REQUIREMENTS

### A. NMED is a recipient of EPA financial assistance

The New Mexico Environment Department is a state government agency that oversees New Mexico's environmental laws.<sup>3</sup> Based in Santa Fe, NMED employs over 550 employees<sup>4</sup> and receives federal funding<sup>5</sup> to promote a simple mission; "To protect and restore the environment, and to foster a healthy and prosperous New Mexico for present and future generations."<sup>6</sup> In relevant part, NMED authorizes permits and manages the public process for those permits, including the WCS discharge permit DP-1817 which process was authorized under the Water Quality Act and 20.6.2 NMAC and managed through NMED's Ground Water Quality Bureau ("GWQB"). NMED is located at: New Mexico Environment Department, Office of the Secretary, Harold Runnels Building, 1190 St. Francis Drive, Suite N4050, P.O. Box 5469, Santa Fe, NM 87502-5469.

### B. This complaint is filed timely with ECRCO within 180 days of the alleged discriminatory act.

NMED facilitated the public process for WCS DP-1817 from July 17, 2013 to December 5, 2018. As detailed below, NMED has repeatedly failed to provide meaningful access or opportunity for LEP individuals and individuals of Hispanic or Mexican descent to participate and to comment in this process. The Secretary's final order approving the DP-1817 Permit was issued on December 5, 2018. Therefore, these discriminatory acts continued at least until that date when NMED ended the public participation process and approved the permit. EPA regulations require complaints to be filed within one hundred eighty (180) days of the alleged discriminatory act. This complaint is timely, being filed on June 3, 2019.

### C. NMED's actions, omissions, and/or policies, patterns and practices subject a person or class of persons to discriminatory treatment or discriminatory impact on the basis of their race, color, national origin (including limited English proficiency), disability, sex, or age.

#### 1) WCS DP-1817 permitting process

##### a) Disparate treatment

- i) NMED treated LEP community members disparately by providing far less critical information to LEP individuals than to English speakers throughout the WCS DP-1817 permitting process. For the first five years of this process, until the September 1, 2017 public notice was translated into Spanish, NMED repeatedly issued English-only notices and draft permits. Even after a second public notice was translated into Spanish on November 17, 2017, until July of 2018, only 10

<sup>3</sup> About NMED, <https://www.env.nm.gov/about-us/> (last visited June 26, 2018)

<sup>4</sup> *Id.*

<sup>5</sup> NMED has received \$22.53 million from EPA for Fiscal Years 2009 – 2019, *Recipient Profile, Environment Department, New Mexico*, USASPENDING, <https://www.usaspending.gov/#/recipient/0998a333-06bb-82ba-5501-bdec891e2493-C> (last visited April 3, 2019).

<sup>6</sup> About NMED (June 26, 2018), <https://www.env.nm.gov/about-us/> (last visited June 26, 2018)



sentences of information about the permit, the discharge and the facility were available in Spanish. The total amount of information ever available to Spanish speakers throughout the entire six year WCS process was a little more than 17 pages of information plus the translated Index of the Record. Spanish speakers were not allowed to read any of the draft permits, as none was translated even though all were short.

Meanwhile, English speakers had access to around 4,000 pages of information including all three draft permits. Many of the 17 pages in Spanish were missing important information, misrepresented what was said in the draft permit and included mistakes including the wrong date and time for the hearing. Though English speakers could read the actual draft permits, the regulations and other documents in the Record to correct these deficiencies, for the most part LEP Spanish speakers could not. An important issue for DP-1817 was that the final Draft 3 Permit had removed almost all protections that had been written into the Draft 2 Permit. LEP persons could never read Draft 2, or any of the public notices about that draft and had available only a misrepresentation of Draft 3, so it was impossible for them to make this comparison. Despite agreeing to do so in the Resolution Agreement, NMED never agreed to define any documents, including any of the draft permits, as "vital documents." Thus, vital information that was readily available to the public in English was not available in any way to the LEP public. This created a substantial barrier to LEP participation and amounted to disparate treatment of LEP individuals.

- ii) NMED also treated LEP and minority community members disparately by making almost no effort to understand the concerns and needs of the LEP and other affected communities of Hispanic and Mexican descent. Despite provisions in the Resolution Agreement that required NMED to create a "description of the community (including demographics, history, and background)" and to have a "... plan of action for addressing the community's needs and concerns ..." *each time* the public participation process was triggered,<sup>7</sup> neither of these was carried out for DP-1817. NMED did not even follow the requirements of their own Public Participation Policy that "[e]ach Bureau shall develop a PIP for each activity requiring public participation (e.g., permitting actions ...)"<sup>8</sup> No Public Involvement Plan was ever created for this activity, no community stakeholders were identified and little effort was made to create partnerships with private and public entities to share information. NMED said they couldn't create a PIP for a public permit process that had been going on for so long. Nevertheless, they were able to create a PIP for the Waste Isolation Pilot Plant ("WIPP") Draft Permit

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<sup>7</sup> Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 11 (Jan. 19, 2017)(Exhibit 1)

<sup>8</sup> New Mexico Environment Department, Public Participation Policy 07-13, 4 (February 6, 2018), <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-13.pdf> (provided in a file as "Exhibit 3")



Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting ("Volume Mod") even though that permit process had been going on far longer than the process for DP-1817.<sup>9</sup> Not understanding minority communities' history and background as well as their needs and concerns and having no plan to address those concerns amounts to disparate treatment of LEP and minority communities by NMED.

- iii) NMED also treated LEP community members disparately by releasing the translated Index of the Record significantly later than the English version, and by making this and the second fact sheet, that was to summarize the draft permit, unavailable to the community by not noticing their availability in Spanish. The translated Index was also never provided to the Eunice Public Library, the local information repository as promised.

NMED agreed to translate only one primary document, the Index of the Administrative Record. However, the translated Index was posted on the website about a month after the English version was posted—almost half way through the 60-day pre-hearing period when written statements may be submitted for the hearing.<sup>10</sup> This problem was compounded when NMED never noticed the availability of the translated Index, either posted online or at any information repository. At least some English speakers had been informed when the English version was posted. In addition, although two English versions of the Index were provided to the Eunice Public Library, NMED never provided the translated version.<sup>11</sup>

There were similar problems with the translated second fact sheet. Its availability was also never noticed in any way in Spanish. NMED claimed they could not notice the availability of translations and fact sheets,<sup>12</sup> yet just a few months before they had supplemented the first hearing notice with an additional public notice simply to announce the availability of the first fact sheet and its translated version.<sup>13</sup> Again, NMED further limited the amount of information available to LEP individuals compared to what was available to English speakers and these actions amounted to disparate treatment.

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<sup>9</sup> Public Involvement Plan for the Waste Isolation Pilot Plant (WIPP) EPA ID#: NM4890139088; Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July 2018 (provided in a file as "Exhibit 4")

<sup>10</sup> Affidavit of Ex. 6, 7c in the Matter of the Application of Waste Control Specialists LLC for a Groundwater Discharge Permit (DP-1817) for the Waste Control Specialists LLC Facility, GWB-18-11(P), 2, #14, September 17, 2018 (provided in a file as "Exhibit 5")

<sup>11</sup> See contents of NMED binder for English and Spanish DP-1817 documents, located at the Eunice Public Library (photos taken by Ex. 6, 7c on October 4, 2018 after the last day of the hearing) (files provided as a folder as "Exhibit 6")

<sup>12</sup> NMED's Response to CARD's and AFES' Opposed Motion, in the Matter of the Application of Waste Control Specialists LLC Discharge Permit (DP-1817) [No. GWB-18-11(P)] for continuance of the September 21, 2018 Deadline and of the October 2, 2018 Public Hearing, 13-14, September 28, 2018 (provided in a file as "Exhibit 7")

<sup>13</sup> Ground Water Quality Bureau, Notice of Public Hearing, Waste Control Specialists, LLC (DP-1817) *Fact Sheet Available*, issued by email 7-9-2018 (not entered into the Record) (provided in a file as "Exhibit 8")



- iv) NMED treated LEP community members disparately by providing them translated information that was significantly inferior to the information provided to English speakers. Once translation of public notices began in September of 2017, less information was available in PN-2s than ever before. Information that had been available in previous English notices was removed, incorrect information was added and not corrected.

This was only improved somewhat in the first hearing notice as critical information about the discharge was still omitted without explanation. Descriptions of how the public could participate in the hearing left out vital information about public participation and referred the public to English-only regulations for further details. The first hearing fact sheet continued to leave out critical information about the discharge and the description of the draft permit gives almost no actual information about the permit at all. English speakers could correct and supplement what was lacking by reading the short draft permit. Spanish speakers could not.

The second hearing notice does add some new information and provides a more complete description of how the public can participate in the hearing, but continues to leave out critical information that is in the permit. This fact sheet has perhaps the most problems of all and though it was supposed to contain all vital information included in the permit, instead, it omitted large amounts of vital information, introduced new information that contradicted the permit, changed the meaning of summarized passages and passages that were supposed to be quoted word for word, and included incorrect information.

Nor were the concerns, needs, history and background of the affected Hispanic community members discussed or even mentioned though social concerns are supposed to be considered during permitting.<sup>14</sup> Again, throughout the permitting process for DP-1817 English speakers continued to have access to previous, more detailed public notices, three draft permits and thousands of other pages of information in English to supplement and correct deficiencies in documents after translation began. LEP Spanish speakers did not. English-speakers could read the regulations to understand how to provide written comments, Spanish speakers could not.

- v) NMED treated LEP community members disparately by providing fewer opportunities to access NMED's programs and activities during the DP-1817 permitting process by limiting access to NMED's translator/interpreter, website and phone system. None of the public notices or fact sheets for DP-1817 informed Spanish speakers that a translator/interpreter was generally available, not just

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<sup>14</sup> See *In re* Application of Rhino Env'tl. Services, 2005-NMSC-024, ¶¶ 22-24, 138 N.M. 133, 139-40, 117 P.3d 939, 945-46 (holding that "[w]hen the New Mexico Environment Department [] reviews a permit application to operate a landfill, the Department *must* consider public opinion at a public hearing . . . [t]he [] review must include consideration of public testimony about the proposed landfill's adverse impact on a community's quality of life")(emphasis added)(provided in a file as Exhibit 9)



Finally, NMED's lack of attention to the history, background and demographics of the affected community and its lack of a plan to address community needs and concerns beyond the need for translation, also had the disparate effect of making it impossible for LEP individuals to make those needs and concerns known and addressed as part of the permitting process.

**D. NMED continues to have a statewide pattern and practice of discriminatory permitting and lack of access for LEP residents to the public participation and permitting process**

**2) Disparate treatment**

- a) NMED systemically treats LEP community members and members of Hispanic or Mexican descent disparately by not making adequate efforts in most or all permit processes to understand their community' needs and concerns; their history, demographics, and background; by not creating a plan to address those needs and concerns in permitting processes throughout their programs, and by not making the same quantity and quality of vital information available to LEP persons.
- i) NMED does not consult and work with potentially affected and affected communities to understand their history and background, and whether there are social and environmental concerns for LEP individuals, such as a lack of access to health care, a density of polluting facilities, low life expectancy or having their area become known as a "nuclear corridor."<sup>15</sup> They do not make a concerted effort to create partnerships with a variety of private and public entities to share information. Thus, their knowledge about LEP and minority community concerns is extremely limited and these community concerns and needs are not incorporated into the permitting process.

NMED's continuing refusal to allow any involvement by the LEP and Hispanic or other minority public in the creation of Public Involvement Plans has resulted in PIPs that describe little about potentially affected communities beyond a possible need for translation. Sometimes even that is missed since NMED over-relies on EJSCREEN as almost the sole basis for making a determination regarding the existence or absence of social or civil rights concerns and usually uses a small target area around the facility—typically 4 or 6 miles. This despite EPA warnings not to rely on EJSCREEN in this way and that looking at small geographic areas can lead to substantial uncertainty in demographic and environmental data.<sup>16</sup> Occasionally other data, like US census data, is incorporated as well. Since PIPs do not include information on community needs and concerns beyond translation and some participation needs, no detailed plan of action to address communities' other concerns is ever included. If PIPs are supposed to be the detailed action

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<sup>15</sup> CIS Development Project: Eddy-Lea Energy Alliance LLC, *Holtec & ELEA, LLC's Vision for a Centralized Interim Storage Facility*, 5,(May 11, 2017)

<sup>16</sup> U. S. Environmental Protection Agency EJSCREEN Fact Sheet (August 14, 2018) [https://www.epa.gov/sites/production/files/2018-08/documents/2018\\_ejscreen\\_fact\\_sheet\\_8-14-18.pdf](https://www.epa.gov/sites/production/files/2018-08/documents/2018_ejscreen_fact_sheet_8-14-18.pdf) (last visited June 3, 2019)(provided in a file as "Exhibit 10")



during the public hearing itself. In addition, during the permit hearing, almost the entire NMED website was English-only with some information in Spanish, mostly having to do with the Resolution Agreement, the three implementing Policies and how to file a discrimination complaint with NMED. A few translated documents about DP-1817 were posted during the hearing but even fewer had their availability noticed so they were still inaccessible to LEP individuals. Despite public requests over a period of years for a Spanish option for their phone system, not a single phone number at NMED, including that for the non-discrimination coordinator, has such an option. Limiting LEP individuals' access to information throughout the permitting process while English speakers had full access to all documents in the Administrative Record, to every page on NMED's website and to NMED's entire phone system, amounted to disparate treatment of LEP individuals.

**b) Disparate effect**

NMED's handling of the DP-1817 permitting process had a disparate effect on LEP community members because so severely limiting the amount of information available to LEP persons did not provide them a meaningful opportunity to participate in the process compared to English speakers. The WCS facility, the discharge from that facility, the geology and hydrology of the discharge area in New Mexico, and the draft permit proposed to regulate the discharge are each extremely complex issues that are difficult to understand. The public permitting process is also complicated. Even at its fullest, the amount of information available to LEP persons was not sufficient to allow them to inform themselves adequately.

NMED compounded this deficiency in the amount of translated information by providing information to the LEP community that was deficient in quality as well since much of it included multiple errors and omissions. In addition, almost all the information provided was also provided late in the process, no earlier than the public hearing stage and some even part way through the pre-hearing period, while English speakers had been included from the beginning. Because of the complexity of the subject and the convoluted process NMED had envisioned for LEP individuals to access information additional to public notices or fact sheets, LEP individuals needed additional time to inform themselves yet received less time with vital information than English speakers had.

NMED's actions thus resulted in the disparate effect of making it impossible for LEP individuals to participate fully in the permitting process because they could not understand the most basic aspects of the permit, the discharge and the WCS facility. They could not correct this deficiency as English speakers could, since they were not able to access all the vital information that was readily available to the public in English. Not informing LEP individuals that a translator/interpreter was always available to help them, and making it more difficult for them to communicate with NMED by phone than it was for English speakers further reduced their ability to inform themselves and participate in the public process in a meaningful way.



plans inform communities, they fall woefully short in this regard. PIPs are also not translated and so are unavailable to the LEP community.

Sometimes not even this effort is made, as despite requirements in NMED's Public Participation Policy to create at least a PIP for every action that triggers public participation, NMED does not always meet this obligation.

- ii) NMED systemically treats LEP community members disparately by providing far less vital information to LEP individuals than to English speakers in their programs and activities throughout the state. NMED has committed to translate "vital documents" for affected limited English proficiency communities.<sup>17</sup> However, NMED does not have a definition of "vital document," which allows NMED to practice subjectivity when deciding which documents to translate. This has resulted in only one primary document (the WCS Index of the Record) being translated out of the hundreds of permit hearings that have occurred since NMED signed the Resolution Agreement. None of these hundreds of permits, even when short, has been defined as a "vital document" or translated. PIPs are never translated. Thus, the amount of information available to LEP individuals is still greatly limited and vital information regarding permits and facilities that is readily available to the English speaking public continues to be unavailable to the LEP public.
- iii) NMED systemically treats LEP community members disparately by not notifying them of all available LEP services and translated documents, thus further decreasing the amount of vital information available to LEP persons in comparison to English speakers. Despite PIPs sometimes stating that public notices will contain a statement that NMED has an in-house translator/interpreter and that non-English speakers may call NMED to request language assistance to learn more about the permit and permitting process, public notices in at least the Ground Water Quality Bureau and the Hazardous Waste Bureau continue to be published without this information. NMED has also stated that it is not their responsibility to inform the LEP public of the availability of translated documents.<sup>18</sup>
- iv) NMED systemically treats LEP community members disparately by continuing to limit LEP individuals' access to the NMED phone system and by providing far less information on their website in Spanish than in English despite the website being listed in PIPs as a significant part of outreach activities. There continues to be no Spanish option on NMED's phone system and only minimal information in Spanish on their website as most pages, by far, are still in English.
- v) NMED systemically treats LEP community members disparately by not analyzing the need for translation and not budgeting for language services at the

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<sup>17</sup> Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, Jan. 19, 2017, 7, (Exhibit 1)

<sup>18</sup> NMED's Response to CARD's and AFES' Opposed Motion, 13-14 (September 28, 2018)(Exhibit 7)



programmatic or statewide level for any of their public permit processes. Limiting these analyses only to the local or facility level ignores federal guidelines and also ignores the need for information for the large number of LEP New Mexicans who live throughout the state—NMED's program area. Many LEP persons have an interest in land development and water issues whether those issues are next door or across the state. Since many facilities include facility transportation that can create a disparate effect in communities far from the facility site, limiting these analyses to such a small area also limits the information available to potentially affected LEP individuals who do not live within a small area nearby the facility. PIPs often state that translation/interpretation will be arranged "...to the extent possible," or that if additional services are requested beyond what is described in the PIP, "...the budgetary implications will be reviewed." Clearly NMED is not addressing even the information needs of interested LEP New Mexicans throughout the state or even, sometimes, those beyond the 4 or 6 mile EJSCREEN limit.<sup>19</sup>

- vi) NMED systemically treats LEP community members disparately by following their LEP Accessibility and Outreach Policy that directs NMED employees to "... assess historical participation ... to evaluate whether there was participation by LEP individuals in the past."<sup>20</sup> This reasoning violates federal guidelines that require recipients to assess LEP community needs at a programmatic level instead of reviewing on a case by case level.<sup>21</sup> This approach also punishes LEP communities by "blaming the victim" when NMED has historically obstructed public involvement by this segment of the public.
- vii) NMED systemically treats LEP and minority community members disparately by providing inadequate and incomplete non-discrimination training for it's employees. Each of NMED's three policies implementing the Resolution Agreement requires non-discrimination training for employees. Yet again, however, the LEP and minority public have not been allowed any involvement in creating the curriculum for the training or even to know what that curriculum is. That the training does not fully cover all important aspects of non-discrimination, however, has been made clear through statements made by NMED employees during multiple permit processes.
- viii) NMED systemically treats LEP and minority community members disparately by not providing a formal process to include such community members in the creation, review or correction of policies, PIPs, definitions of vital documents, summaries of vital information, translated fact sheets or other translations. In

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<sup>19</sup> LANL DP-1793 transcript, 332-333, November 8, 2018 (Exhibit 12)

<sup>20</sup> Limited English Proficiency ("LEP") Accessibility and Outreach Policy, Policy and Procedure 07-11, 7, <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-11.pdf> (last visited June 3, 2019)(provided in a file as "Exhibit 11")

<sup>21</sup> Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. 35,606, 35,607 (Jun. 25, 2004) (EPA LEP Guidance) <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf> (last visited June 3, 2019)(provided in a file as "Exhibit 18")



other words, NMED has removed community influence from the very processes and policies created to provide a non-discriminating public process for these same communities. NMED claims that there is at least a process to submit public comment on the PIPs but in fact, that is not the case. There is no process—only a statement that the public is welcome to submit suggestions or comments on PIPs or other processes to NMED's general counsel. NMED does not acknowledge the receipt of such suggestions and comments, discuss them with the submitters or announce whether or not any suggestions will be incorporated in NMED's public process.

- ix) NMED systemically treats community members of Hispanic and Mexican descent disparately by not ensuring that hazardous waste permit applications contain all necessary components required by 40 C.F.R. §270.10(j) to provide information on effects from facilities and from facility transportation during normal operations and during accidents. Although in the Resolution Agreement NMED committed to ensuring the inclusion of such information in *all* hazardous waste permit applications, in fact they have not been requiring the information to be included in recent hazardous waste permit processes, providing various excuses as to why such information is not needed.

**b) Disparate effect**

- i) NMED's practice of not investigating LEP and minority community history, background, needs and concerns beyond a possible need for translation has resulted in those concerns and needs being ignored in virtually all of NMED's permitting processes. In fact, when such social concerns about possible disparate impacts and civil rights issues have been raised during hearing processes NMED has claimed that the public process is not the place to discuss such concerns.<sup>22</sup>

The small target area usually addressed in PIPs makes even the community's need for translation questionable as potentially affected communities are eliminated from consideration. This has resulted in a pattern and practice of disparate effect as LEP persons cannot participate meaningfully in the permitting process when their needs and concerns are not addressed and even translation needs are sometimes ignored. When the process to site a facility or approve a permit ignores the environmental, health and pollution history and background of a minority or LEP community, this also leads to disparate effects on that community as the permit cannot be truly protective without somehow incorporating that information.

- ii) NMED's pattern and practice of not identifying vital documents and translating them has resulted in a disparate effect on LEP individuals throughout the state as

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<sup>22</sup> Transcript of the Proceedings, In the Matter of Los Alamos National Laboratory's Groundwater Discharge Permit, DP-1793, November 8, 2018, Volume 2, 329-337 (Cross-Examination by Joni Arends of NMED witness Stephen Pullen)(provided in a file as Exhibit 12); Transcript of the Proceedings, In the Matter of the Waste Isolation Pilot Plant's Hazardous Waste Facility Permit, October 25, 2018, 22-46 (EPA ID NO. NM4890139088)(Cross-Examination by Joni Arends of NMED witness Paul Maestas)(provided in a file as Exhibit 13)



they receive far less information about NMED's programs and actions than English speakers do and therefore cannot participate equally and in a meaningful way in the permitting process. This disparate effect is compounded by not analyzing the need for language services programmatically and budgeting only on the local or facility level. Large numbers of potentially affected LEP individuals are missed when NMED only looks at a few miles around a facility or discharge area. Their ability to participate is disparately affected compared to English speakers who have no barriers to NMED's information.

- iii) NMED continues to have a pattern and practice of not notifying LEP individuals that there is an in-house interpreter/translator available and not notifying them when and where translated documents are available. This has created a disparate affect on these individuals as it further limits their access to documents and information, including information about how to participate in NMED's public processes so they cannot adequately inform themselves. English speakers have no such problem as almost all information at NMED is in English. Although some PIPs are beginning to say that notices will include statements that this interpreter/translator is available and statements on how LEP persons can receive additional information, in fact, public notices still do not include this information. Since the PIPs are not translated, even this much information is denied to LEP individuals.
- iv) NMED's practice of maintaining an English-only phone system and the limited amount of information in Spanish on their website has also created a disparate effect on LEP persons as these individuals' cannot communicate with NMED and inform themselves in the same way that English speakers can. It is impossible to participate meaningfully in NMED's programs and actions without adequate information.

In fact, the combination of little translation, lack of notice of the availability of a translator/interpreter, lack of notice of the availability of translated documents beyond public notices, an English-only phone system and a website with substantially less information in Spanish than in English create a perfect storm of disparate effects that together make it virtually impossible for LEP persons to participate fully in NMED's programs and actions.

- v) NMED's practice of analyzing the need for language services for LEP communities by assessing their historical participation in NMED's permitting actions creates a disparate impact on these communities by potentially further reducing their access to information and making it impossible for these communities even to begin to participate in public processes now. It is NMED that has historically obstructed these communities from participating by providing no information at all in Spanish or in languages other than English. Although some Bureaus like the Solid Waste Bureau, have historically provided notice in Spanish and even other languages in the past, most Bureaus have not. NMED has a lot to make up for and limiting language services and outreach to communities



of Hispanic and Mexican descent because these communities have not been involved historically, simply makes the disparate impact greater.

- vi) NMED's refusal to allow LEP and minority individuals to have any influence on the employee non-discrimination training when that training is specifically supposed to make NMED more inclusive for these individuals, has resulted in inadequate training and a disparate impact on these persons. When employees are not trained to understand the importance of LEP and minority community concerns and impacts, these are not included or assessed when siting facilities and writing permits. Plans and permits that do not address these concerns are inherently incomplete and inadequate to protect these individuals and their communities.

Employees are telling the public that the permitting process is not the place to discuss civil rights, social concerns and disparate impacts when in fact, it is exactly in this process where these should be discussed. When employees provide inaccurate information to LEP and minority individuals and their representatives, they create a disparate impact on these individuals and communities as they are obstructed from having any influence on permitting decisions and therefore are unable to participate meaningfully in the process.

- vii) NMED's practices of not allowing LEP and minority community members to have any involvement in the creation of the three policies implementing the Resolution Agreement, not allowing them to be involved in the creation of any of the PIPs, and of not having a formal policy for these individuals to review and correct problems with the definition of vital documents, summaries of vital information, translated fact sheets or other translations, has created a disparate impact on these community members. Because these communities have been kept at arms length throughout the creation of these policies and processes, the policies and processes continue to be flawed and have not been effective in creating a culture of non-discrimination throughout NMED's programs and activities.

Without a formal process to incorporate public input, LEP and minority community members cannot make sure that policies and PIPs are adequate to assure that their needs and concerns are incorporated into the permitting process. When NMED forges ahead with the public permitting process without a review process, refuses to allow policies and PIPs to be discussed in hearings, only promising to fix them at some vague time in the future, LEP and minority community members are left in the dust with their needs and concerns ignored and unfulfilled.<sup>23</sup> Not involving the LEP and minority public in creating and improving the policies and PIPs, has created a disparate impact on these communities with no true way to correct it.

Without a formal and timely review and correction process that is incorporated into the permitting process itself, community members also cannot make sure that

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<sup>23</sup> WIPP Volume Mod transcript, 36-38, October 25, 2018 (Exhibit 13)



vital documents are translated and that summaries and translations are accurate. Again, this creates a disparate impact as it not only decreases the amount of information available to LEP persons but also leaves them with flawed information in contrast to the variety of additional accurate information that is available for English speakers.

One or more of these problems exist in many public processes throughout NMED's programs, yet there is no formal way to review and correct mistakes. Sending a letter or email to NMED's general counsel for a review once a year does little to help when inaccurate summaries or translations are circulated before a comment period or hearing and not corrected.

- viii) NMED's pattern and practice of not ensuring that *all* hazardous waste permit applications contain all necessary components required by 40 C.F.R. §270.10(j) to provide information on effects from facilities and from facility transportation during normal operations and during accidents, has resulted in a disparate effect on minority communities as it is impossible to create a disparate impact study of effects from such facilities on potentially affected and affected minority communities without first understanding what those effects are. Despite the fact that these studies of effects are required in the regulations, NMED continues to avoid requiring them in hazardous waste facility applications even for important and potentially dangerous facilities like WIPP and Triassic Park.

### III. NMED's discriminatory actions, omissions, and/or policies, patterns, and practices

#### A. Background

##### 1) New Mexico

New Mexico is the only state where no single racial group is in the majority, though those of Hispanic and Mexican descent come close as the 2017 ethnic breakdown in New Mexico is 48.8% Hispanic, 38.2% White, 9.1% American Indian.<sup>24</sup> Hispanics maintained this percentage in 2018 and New Mexico is the state with the highest percentage of Hispanics in the country<sup>25</sup>. 35.7% of the population speaks a language other than English in the home and the majority of these residents are Spanish speakers.<sup>26</sup>

New Mexico is one of the poorest states in the nation, being tied with Louisiana for the second highest poverty rate in 2017. This poverty rate is worse for people of color in New Mexico with 23% of Hispanics and 33.8% of Native Americans living in poverty in 2017 compared to only 12.1% of non-Hispanic Whites—almost two and three times as

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<sup>24</sup> New Mexico Department of Health, State Center for Health Statistics, Bureau of Vital Records and Health Statistics, Epidemiology and Response Division, *New Mexico Selected Health Statistics, Annual Report 2017*, 7, <https://nmhealth.org/data/vital> (last visited June 3, 2019)

<sup>25</sup> Instituto Cervantes at FAS - Harvard University, *Hispanic Map of the United States 2017*, 12-14, November 2017, [http://cervantesobservatorio.fas.harvard.edu/sites/default/files/hispanic\\_map\\_2017en.pdf](http://cervantesobservatorio.fas.harvard.edu/sites/default/files/hispanic_map_2017en.pdf) (last visited on June 3, 2019)(provided in a file as "Exhibit 50")

<sup>26</sup> United States Census Bureau, New Mexico Quick Facts, New Mexico, <https://www.census.gov/quickfacts/NM> (last visited on June 3, 2019)



many. US percentages at the same time were, 19.4% for Hispanics, 33.8% for Native Americans and 9.6% for non-Hispanic Whites. These high poverty rates continued during all the years that the WCS discharge permit public process was ongoing.<sup>27</sup> For years, New Mexico has also been among those states with the highest child poverty rates. In 2017 it was ranked as the worst state in the nation for child poverty with a child poverty rate of 30%. There are significant racial disparities in the child poverty rate as well, with the Hispanic rate being twice the rate for Whites (24% compared to 12%) and the Native American rate almost three times that of Whites (32%)<sup>28</sup> In 2016 New Mexico had the highest unemployment rate of all the states (6.7%).<sup>29</sup> Even in 2019 New Mexico has not fully recovered from the Recession and still has an unemployment rate of 5% while the US average is just 3.8%. Only one state and the District of Columbia have higher rates of unemployment.<sup>30</sup>

Education is also depressed with 2013-2017 high school graduation rates at 85.0% giving the state a rank of 45 among all states and a rank of 50th for the percentage of third graders able to read at grade level in 2016.<sup>31</sup> Causes for this poor graduation rate include poverty and large numbers of LEP students. In 2014-2015 New Mexico had the worst graduation rate of all states and also had the highest percentage of students who qualified as English Language Learners (27%). Most of these LEP students are Spanish speakers; there are also Native American speakers.<sup>32</sup>

As far as health care goes, in New Mexico, Hispanics are more than twice as likely as Non-Hispanic Whites to lack healthcare coverage (25% vs.12%) and those Hispanics living in poverty are much more likely never to have received cancer-screening exams or early and continuous prenatal care. The burden of respiratory diseases that are prevalent in the southeastern part of the state also falls more heavily on Hispanics than on other ethnic groups with asthma prevalence higher among Hispanics (12.6%) than Whites (11.4%) and Native Americans (9.4%).<sup>33</sup>

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<sup>27</sup> New Mexico Department of Workforce Solutions, Rachel Moskowitz, Bureau Chief, Economic Research & Analysis Bureau, *Poverty in New Mexico*, 8-10, 2019, [https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty\\_in\\_NM.pdf](https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty_in_NM.pdf) (last visited on June 3, 2019)(provided in a file as "Exhibit 51")

<sup>28</sup> New Mexico News Port, Justina Grant and Cayla Montoya-Manzo, *New Mexico Ranked Worst in the Nation for Child Poverty*, December 5, 2017, <http://www.newmexiconewsport.com/new-mexico-ranked-worst-nation-child-poverty/> (last visited on June 3, 2019)

<sup>29</sup> RI Department of Labor and Training, Labor Market Information, Unemployment Rates for States 2011 - Present, 2016, <http://www.dlt.ri.gov/lmi/laus/us/annavg.htm> (last visited on June 3, 2019)

<sup>30</sup> U.S. Department of Labor, Bureau of Labor Statistics, Unemployment Rates for States, Seasonally Adjusted, April 2019, <https://www.bls.gov/web/laus/laumstrk.htm> (last visited on June 3, 2019)

<sup>31</sup> New Mexico Department of Health, Epidemiology and Response Division, 2018 The State of Health in New Mexico, 90, April 2018, <https://ibis.health.state.nm.us/report/soh/Introduction.html> (last visited on June 3, 2019)(provided in a file as "Exhibit 52")

<sup>32</sup> Albuquerque Journal, Kim Burgess, Journal Staff writer, *NM 2015 Graduation Rate was Worst in Nation*, May 8, 2017, <https://www.abqjournal.com/1000114/nm-2015-graduation-rate-worst-in-nation.html> (last visited on June 3, 2019)

<sup>33</sup> New Mexico Department of Health, *2018 The State of Health in New Mexico*, April 2018, (Exhibit 52)



## 2) **Lea County**

Lea County is a rural county with an economy that focuses on farming, ranching and mining, including potash, oil and gas. The economy also includes "warehousing" and transportation. Oil and gas production far surpasses any other source of employment.<sup>34</sup> A majority of the population in the county is Hispanic (58.5% in 2018). In Lea County fewer people were graduated from high school between 2013 to 2017 than in the US (72.9% compared to 87.3%) and far fewer received B.A.s (13.1% compared to 30.9%). More people speak a language other than English in the home in Lea County than in the state and almost twice as many as in the US (39.9% compared to 21.3%) Of all counties, adults in Lea County were least likely to have a primary childcare provider.<sup>35</sup>

Like most counties in New Mexico, Lea County has been designated a "primary care health professional shortage area." 24.2% of people are uninsured in Lea County, almost twice the national rate of 12.7% and higher than New Mexico's rate at 18.1%. Although the percentage of people living in poverty in the county from 2013 to 2017 was somewhat lower than the New Mexico poverty rate (16.1% compared to 19.7%), both rates were higher than the US rate of 12.3%.<sup>36</sup> This partial economic improvement is probably helped by one of the largest oil and gas development booms in history. However, it has not been as significant as it could be for the local area as many workers in the industry are imported from other states and are not necessarily permanent residents. Though creating many jobs, the industry also contributes significantly to the high pollution levels in Lea County and most of southeastern New Mexico. Thus, local people of Hispanic and Mexican descent, still suffer from poorer health, lower education levels, higher poverty and less access the health care. The unemployment rate was still higher in the county than in the state and nation in 2017 despite the "boom" (6.6 in Lea County, 6.1 in New Mexico and 4.4 in the US).

Like next-door Chaves County that we described in our previous 2002 Title VI complaint, Lea County and most of southeastern New Mexico have poor air quality. Measured in particulates, Lea County is just as bad as Chaves County though additional factors also come into play including enormous methane pollution. Besides the refineries and the thousands of oil and gas wells that pepper the landscape, this area is subject to multiple other pollution and contamination sources including WCS itself; the Navajo Refinery, URENCO USA, a uranium enrichment facility; the Sundance Services Parabo Disposal Facility, an oilfield waste disposal facility or landfarm; and the Lea County Landfill. All of these are close by the towns of Eunice and Hobbs. In 2014 the Waste Isolation Pilot Plant (WIPP) radioactive and hazardous release affected the northern part of the county and fallout from the 1945 Trinity atomic bomb test may have touched the

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<sup>34</sup> New Mexico State University, Office of Policy Analysis at Arrowhead Center, *The Economic Base of Lea County, NM*, July 2017, <https://arrowheadcenter.nmsu.edu/wp-content/uploads/sites/19/2017/09/Lea-County-2017.pdf> (last visited on June 3, 2019)

<sup>35</sup> New Mexico Department of Health, Indicator-Based Information System (NM-IBIS), *Health Highlight Report for Lea County*, November 28, 2018, <https://ibis.health.state.nm.us/community/highlight/report/GeoCnty/25.html> (last visited on June 3, 2019)

<sup>36</sup> *Id.*



county as well. The Triassic Park hazardous waste disposal facility site, subject of our 2002 complaint, is just over the county border.<sup>37</sup>

Transportation is one of the main economic sectors in the area and facility transportation to WCS, WIPP, Triassic Park, URENCO, various landfarms, landfills, refineries and wells produces an unknown but large amount of pollution. The oil and gas economic boom has massively increased the number of cars and trucks on the roads in Lea County as well as throughout southeastern New Mexico and the accident rate has increased as well. Though the total amount and kinds of pollution have not been completely studied, diesel exhaust is listed as one of the main causes of the area's high lung cancer rate.<sup>38</sup>

Consolidated Interim Storage Facilities for more than 10,000 spent fuel rods produced in the US are proposed both for the WCS facility itself and for the Holtec International facility, both also in Lea County. Facility transportation of that high level radioactive and hazardous waste through Lea County, now planned to be by rail, would also create an unknown amount of pollution, diesel exhaust and irradiation along the transportation routes.

With multiple pollution and contamination sources, low education rates, high numbers of non-English speakers, somewhat high poverty rates, a high minority population and very poor access to health care, it is no surprise that Lea County has one of the lowest life expectancy rates—the absolute lowest for women in 2014<sup>39</sup> and one of the highest cancer mortality rates in the state; health in the county is poor in general. The cardiovascular disease rate is among the highest in the state. Lea County also had the highest asthma hospitalization rate and from 2013 to 2017 had more than twice the state rate of childhood asthma hospitalizations (29.7/10,000 to New Mexico's 14.4). Low income, Low English Proficiency (LEP), particulates and lack of access to health care are some of the causes. Infant mortality in 2012 - 2016 was also higher than both the state and the nation in Lea County (7.5 deaths/1000 live births compared to 5.8 for the state and 5.9 for the US). Congenital malformations, deformations and chromosomal abnormalities were the greatest cause of these deaths—all possibly related to pollution and contamination. The high lung cancer death rate (42.0/100,000 in Lea County, 28.1 in New Mexico) is caused mostly by smoking, but other causes are familiar: radon, arsenic, diesel exhaust, air pollution and arsenic in the water; along with Low English Proficiency, poverty and lack of education.<sup>40</sup> Indeed, though Lea County is one of the worst counties affected, most of southeastern and some of south central New Mexico suffer from similar statistics and causes. The highest cancer mortality rate in the state exists in this area and **only in this area** of New Mexico. Lea County is part of this highest cancer mortality area.

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<sup>37</sup> *Southeast New Mexico Threats Map*, Ex. 6, 7c Design, LLC, 2019 (Exhibit 35)

<sup>38</sup> New Mexico Department of Health (NM-IBIS), *Health Highlight Report for Lea County*, November 28, 2018

<sup>39</sup> Institute for Health Metrics and Evaluation, *New Mexico Life Expectancy Female, County Comparisons*, 2014, <https://www.worldlifeexpectancy.com/usa/new-mexico-life-expectancy-by-county-female> (last visited on June 3, 2019)

<sup>40</sup> New Mexico Department of Health (NM-IBIS), *Health Highlight Report for Lea County*, November 28, 2018



### 3) Eunice

Eunice is the nearest New Mexican municipality to the WCS discharge, being 6 miles away from the facility itself and a mere 4.5 miles away from the point of discharge in New Mexico. Eunice is a small town with a population of approximately three thousand, of which 54% are Hispanic,<sup>41</sup> with 45% speaking Spanish at home.<sup>42</sup> The city boasts “a friendly small town atmosphere, great schools and churches, clear skies, mild winters and a low cost of living.”<sup>43</sup> These are all true and Eunice is a lovely town. Eunice is also a poor town with 68% of students eligible for reduced or free lunches and is tied for the second highest school dropout rate in the state—at least twice the state average at 8%.

The town is also situated in the middle of the Permian Basin, and Eunice is entwined in oil and gas development with hundreds of oil wells directly surrounding the town<sup>44</sup> and pump-jacks dotted even throughout the town itself in both commercial and residential neighborhoods.<sup>45</sup> The smell of methane is pervasive, as it is in nearby Hobbs and the surrounding area. There are also multiple other potentially polluting facilities nearby. As described above, between Eunice and the WCS discharge point is URENCO USA, a uranium enrichment facility; and the Sundance Services Parabo Disposal Facility, an oilfield waste disposal facility or landfarm. Also nearby is the Lea County Landfill.

### 4) Waste Control Specialists (WCS)

The WCS property spans the New Mexico-Texas border, though the waste management facility itself is in Andrews County, Texas. This facility is located about 6 miles east of Eunice, New Mexico and consists of four distinct licensed facilities. **The Hazardous Waste Facility** is licensed to treat, store, and dispose of hazardous waste including polychlorinated biphenyls and asbestos. **The Texas Compact Waste Disposal Facility** is licensed to dispose of Class A, B, and C low-level radioactive waste. The **Federal Waste Disposal Facility** is similarly licensed to dispose of low-level radioactive waste and additionally licensed to dispose of mixed low-level radioactive waste. Highly unstable and potentially explosive transuranic mixed waste originally headed for WIPP is also stored indefinitely in the Federal Waste Disposal Facility. Finally, the **Byproduct Material Disposal Facility** is licensed to dispose of uranium metal products.<sup>46</sup> In addition, WCS has applied to the Nuclear Regulatory Commission to be licensed as a **Consolidated Interim High Level Waste Storage Facility**.<sup>47</sup> If licensed, materials onsite would also include thousands of spent fuel rods and

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<sup>41</sup> EJSCREEN ACS Summary Report, Location: City: Eunice city, created Apr. 10, 2018.

<sup>42</sup> *Id.* at 2.

<sup>43</sup> Eunice, New Mexico City Website, Home Page, <https://www.cityofeunice.org/>

<sup>44</sup> Satellite map of Eunice, New Mexico and the surrounding area, Google Maps, 2018 (Exhibit 36)

<sup>45</sup> Satellite map of Eunice, New Mexico community center and nearby blocks showing pumpjacks, Google Maps, May, 2018, (Exhibit 47); Satellite map of Eunice, New Mexico High School and nearby blocks showing pumpjacks, Google Maps, May, 2018 (Exhibit 48)

<sup>46</sup> New Mexico Environment Department, Ground Water Quality Bureau, Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, June 9, 2017 (3rd and final Draft Permit) [http://nuclearactive.org/wp-content/uploads/2017/08/d\\_WCS\\_GWDP\\_1817\\_060917.pdf](http://nuclearactive.org/wp-content/uploads/2017/08/d_WCS_GWDP_1817_060917.pdf) (last visited June 3, 2019)(provided in a file as "Exhibit 16").

<sup>47</sup> Letter to Mark Lombard, Director, United States Nuclear Regulatory Commission re: License Application to Construct and Operate a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas, Docket 72-1050, Apr. 28, 2016, <https://www.nrc.gov/docs/ML1613/ML16132A533.pdf>.



wastes from reprocessing high-level waste.<sup>48</sup> Through various permits issued by Texas, WCS is authorized to discharge water from five outfalls, four of which have been constructed.<sup>49</sup> Of these, discharges from two outfalls flow into New Mexico.<sup>50</sup>

#### **A. Examples of past and ongoing discriminatory practices**

##### **(1) CARD's 2002 Title VI Complaint Alleged Similar Violations**

In 2002, CARD filed a Title VI complaint against NMED with the EPA, regarding a permit for a hazardous waste facility in Triassic Park. The 2002 complaint alleged that NMED's permitting process discriminated against LEP individuals by failing to allow meaningful access, similar to the allegations in this complaint. Specifically, the 2002 complaint alleged that the public was obstructed from participating in the public participation process for the facility, was denied access to vital documents, and that NMED refused to consider social and discrimination concerns when deciding whether to approve the permit. It also alleged that NMED had a statewide pattern and practice of similar discriminatory permitting and lack of access for LEP individuals. The EPA accepted CARD's Triassic Park complaint for investigation in 2005, which later led to the 2017 Resolution Agreement between NMED and the EPA. The Resolution Agreement required that NMED develop and implement a language access policy and a public participation policy in order to come into compliance with federal civil rights law.

##### **(2) The Resolution Agreement and NMED's Subsequent Policies**

Title VI of the Civil Rights Act of 1964 prohibits NMED from implementing their programs in a discriminatory manner, meaning that NMED must ensure that LEP individuals have meaningful access to their services. NMED committed to provide meaningful access when they signed the 2017 Resolution Agreement,<sup>51</sup> whereby they promised to take specific steps to ensure that community demographics, history, background, needs and concerns were understood and addressed; that effects from hazardous waste facilities and from facility transportation were understood; and that their public participation and permitting programs did not discriminate.<sup>52</sup> NMED agreed that meaningful public involvement consists of informing, consulting and working with communities at various stages of the decision making process to make sure their needs and concerns are being addressed.<sup>53</sup> Pursuant to the Resolution Agreement, NMED created a Public Participation Policy, a Limited English Proficiency Accessibility and Outreach Policy, and a Disability Accessibility and Outreach Policy.

On February 6, 2018, Butch Tongate, the Cabinet Secretary at the time, signed NMED's Public Participation Policy, so that NMED's public participation proceedings would comply with Title VI of the Civil Rights Act of 1964.<sup>54</sup> NMED's new Public Participation Policy provided that "NMED shall provide proper and appropriate public

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<sup>48</sup> Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, Jun. 9, 2017 (Exhibit 16).

<sup>49</sup> *Id.* at 2 (outfall 004 was never constructed).

<sup>50</sup> *Id.*

<sup>51</sup> Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, Jan. 19, 2017 (Exhibit 1).

<sup>52</sup> *Id.* at 11 and 12

<sup>53</sup> *Id.* at 11

<sup>54</sup> New Mexico Environment Department, Public Participation Policy 07-13, February 6, 2018 (Exhibit 3)



participation opportunities related to NMED's actions and proceedings."<sup>55</sup> However, on January 11, 2018, CARD's counsel received a phone call from NMED's General Counsel, Jennifer Hower, indicating that NMED was not willing to receive any public input on their policies even from LEP and minority communities as the policies were an "internal matter." Thus, the policy was created without any public input at all despite EPA guidance to the contrary.<sup>56</sup> Furthermore, NMED tasked each bureau to do preliminary screening and develop its own Public Involvement Plans (PIPs) under the Policy, also with no public involvement even from LEP and minority potentially affected and affected communities. Again, such involvement in the PIPs is a cornerstone of EPA guidance.<sup>57</sup>

On February 6, 2018 Secretary Tongate signed NMED's Limited English Proficiency Accessibility and Outreach Policy, so that NMED could provide LEP persons with meaningful access as per Title VI.<sup>58</sup> NMED's new LEP Policy provided that "NMED shall provide LEP persons and populations meaningful access to NMED's actions and proceedings."<sup>59</sup> NMED, once again, developed the policy with no public input, including no input from LEP persons. NMED employees were to determine the extent of providing LEP services, in part, by assessing past participation, stating "Employees shall also assess *historical* participation ... to evaluate whether there was participation by LEP individuals in the past."<sup>60</sup> If an employee determined that LEP services were warranted, NMED agreed to translate "*vital documents*."<sup>61</sup> NMED's LEP Policy, however, did not sufficiently define which "vital documents" must be translated. Instead, NMED only vaguely addressed "vital documents" in a footnote, stating "Classifying a document as vital or non-vital is sometimes difficult ..."<sup>62</sup> Translation, interpretation and other services provided to LEP persons were limited by being subject to NMED's available resources.<sup>63</sup>

On February 6<sup>th</sup>, 2018 Secretary Tongate also signed NMED's Disability Accessibility and Outreach Policy, so that NMED could provide disabled persons with meaningful access as per Section 504 of the Rehabilitation Act of 1973 and the ADA of 1990, as amended by the ADA Amendments Act of 2008.<sup>64</sup> NMED, once again, developed the policy with no public input including from any disabled individuals. However, in contrast to the services provided to LEP persons, these services had no financial limitations as the policy stated that "NMED will provide, at no cost to the individual, appropriate auxiliary aids and services including...qualified interpreters...to ensure effective communication...."<sup>65</sup>

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<sup>55</sup> *Id.* at 1 and 2.

<sup>56</sup> EPA Public Participation Guidance, 71 Fed. Reg. at 14,207, 14,211 (Exhibit 19)

<sup>57</sup> *Id.*

<sup>58</sup> New Mexico Environment Department, LEP Policy (February 6, 2018), (Exhibit 11)

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 7 (emphasis added).

<sup>61</sup> *Id.* at 9 (emphasis added).

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.* at 7-8.

<sup>64</sup> New Mexico Environment Department, Disability Accessibility and Outreach policy 07-10 (February 6, 2018), <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-10.pdf> (last visited June 3, 2019)(provided in a file as "Exhibit 22")

<sup>65</sup> *Id.* at 2



Unfortunately, these Public Participation and LEP Policies fall short of federal guidelines interpreting the prohibition against discrimination on the basis of national origin pursuant to Title VI. This has resulted in NMED failing to meet its Title VI obligations both for WCS and for other public processes in the Department. On March 12, 2018, the Environmental Justice Clinic at Yale Law School, on behalf of CARD, sent a letter to Lilian Dorka, Director of the External Compliance Program of the EPA's Office of Civil Rights, outlining these serious shortfalls.<sup>66</sup> The letter reiterated the problem of having public participation policies and Public Involvement Plans created with no public participation or involvement, and especially with no involvement from LEP, minority or disabled individuals for whom the policies and PIPs were supposedly written. The letter described in detail how far the policies diverged from EPA non-discrimination guidance and requested that NMED amend its policies to adhere to these guidelines. Indeed, there is nothing in any of the policies to implement Agreement requirements to understand the history and background of the community or to address community needs and concerns beyond translation and participation needs. The PIPs gather some small amount of demographic data but do not address or even gather information on needs and concerns.

On April 26, 2018, NMED described its progress and efforts to comply with the Resolution Agreement in a letter to Director Lilian Dorka and soon after, CARD, NMED and EPA met by phone to discuss NMED's progress. NMED's efforts did not address most of the concerns described in the March letter and many of their planned actions were not completed. Problems with the policies and the continuing lack of access, and lack of understanding of communities and their concerns, was described again in a December 17, 2018 letter to Jennifer Hower from UNM's Natural Resources and Environmental Law Clinic. This letter was signed by 21 community groups. Almost six months later these same concerns continue as part of our Prayer for Relief. NMED never responded directly to either letter to let the signers know if their suggestions would or not be incorporated into NMED's public process or whether the suggestions were even being considered.

NMED, however, failed to comply with the Resolution Agreement. The policies did not guarantee an improved process and NMED continued to permit hundreds of facility and discharge permits without meeting their Title VI obligations. One of the more important permits was that for the WCS discharge permit, DP-1817. Unsatisfied, with NMED's obstruction and lack of progress, on April 16, 2018, CARD filed a Complaint with NMED for violation of the Resolution Agreement. At that time, NMED had provided only 10 sentences in Spanish in two public notices about the WCS facility, discharge and permit (some of which contained incorrect information), and had translated none of the draft permits or other vital documents. English speakers meanwhile had access to three permit drafts and about 4000 pages of information in English. Despite this obvious imbalance, in June of 2018, NMED's Assistant General Counsel for the GWQB stated that "...the process we have followed thus far, and intend to follow going forward

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<sup>66</sup> Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, *Re: NMED Limited English Proficiency & Public Participation Policies Following the Resolution Agreement in EPA Case No. 09R-02-R6*, March 12, 2018 (provided in a file as "Exhibit 20")



will...ensure that LEP individuals are given ample opportunity to participate...and provide their input and concerns."<sup>67</sup> The WCS facility, its discharge and the risks involved are complex. To imply that 10 sentences in *any* language are adequate for the public to understand enough about these issues to participate in any meaningful way in the permit process is absurd.

On May 4, 2018, NMED accepted CARD's Complaint and delegated the investigation to Kathryn Becker in NMED's Office of General Counsel. Ms Becker reviewed CARD's Complaint against NMED and, on October 2, 2018, recommended that the Complaint be dismissed based on failure to prove by a preponderance of the evidence that NMED caused harm due to a discriminatory action. On October 12, 2018, Secretary Tongate approved the recommendation of Ms Becker and approved the conclusion that the Department did not cause harm and did not discriminate against LEP persons in its public notice. Even at this point, Spanish speakers had only very limited information and what they did have was confusing as it omitted important facts and included multiple changes and mistakes.

### **(3) WCS and the DP-1817 permitting process**

Both NMED and WCS (the applicant) are subject to specific public notice requirements under New Mexico regulations. These New Mexico regulations require outreach in both Spanish and English, include specific information that must be included in each type of public notice (PN-1s, PN-2s, and hearing notices) and specify how each type of notice, at a minimum, must be published.<sup>68</sup>

On July 17, 2013, NMED received a groundwater discharge permit application from WCS. NMED proposed an initial draft permit for approval on October 2, 2015,<sup>69</sup> and subsequently issued two amended draft permits on March 3, 2017,<sup>70</sup> and May 4, 2017.<sup>71</sup> None of the draft permits, was translated into Spanish. Each draft permit included public comment periods and was noticed with Public Notice-2s ("PN-2"). Only two of the six PN-2s were translated into Spanish as NMED continued to issue English-only PN-2s for almost a year after signing the Resolution Agreement.

NMED obstructed participation for all members of the public with mistakes, omissions and confusion during the public process for DP-1817, but this obstruction was more extreme for LEP individuals and the effects of this obstruction fell more heavily on these individuals because of their extremely limited access to information. Where English speakers could make up for deficiencies in public notices and fact sheets by reading the

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<sup>67</sup> Email from Lara Katz, NMENV to Ex. 6, 7c, June 4, 2018 (provided in file as "Exhibit 21")

<sup>68</sup> 20.6.2.3108 NMAC.

<sup>69</sup> NMED Letter to Elicia Sanchez, Sr. Vice President, Chief Financial Office and General Manager of WCS re: Draft Discharge Permit, DP-1817, Waste Control Specialists LLC, Apr. 20, 2015, WQCC 17-01(A), Administrative Record 02212-30.

<sup>70</sup> NMED Letter to Elicia Sanchez, Sr. Vice President, Chief Financial Office and General Manager of WCS re: Draft Discharge Permit, DP-1817, Waste Control Specialists LLC (Sep. 25, 2015), WQCC 17-01(A), Administrative Record 02107-28.

<sup>71</sup> Ground Water Discharge Permit, Waste Control Specialists LLC, DP-1817 draft, Jun. 9, 2017 (Exhibit 16)



actual WCS draft permits (usually about 20 pages long), other documents or the regulations, these sources of information were kept from Spanish speakers.

**(a) Public noticing and fact sheets**

There were ten public notices in all for WCS: one Public Notice 1 (PN-1) published by the applicants on August 14, 2013 and concerning their application; six Public Notice 2s (PN-2s) published between October 2, 2015 and November 17, 2017, noticing draft permits, extensions of comment periods and Spanish translations. Only the last two of the PN-2s were translated into Spanish. Two hearing notices were published on June 5, 2018 and August 2, 2018 announcing different hearing dates; and a supplemental hearing notice was published July 9, 2018 announcing the availability of the first Spanish and English Fact Sheet.<sup>72</sup> There was no supplemental or other notice to announce the availability of the second Spanish and English Fact Sheet or the availability of the Spanish Index of the Record.

The public notices and fact sheets are described in detail in CARD's and AFES' Findings of Fact and Conclusions of Law submitted after the WCS hearing<sup>73</sup>

**September 1, 2017 Public Notice 2<sup>74</sup>**

The first NMED public notice to be translated into Spanish was published on September 1, 2017. PCBs and asbestos were not included as potential contaminants in the description of the quality of the discharge though they are described as contaminants in the permit. This omission occurs in all public notices, but for the first time, radionuclides have been removed from the description of contaminants as well. In the second hearing Fact Sheet NMED said the reason for this removal was "... that the Department determined references to radionuclides were not appropriate because the Department does not have regulatory authority over radionuclides."<sup>75</sup> What was inappropriate, however, was the removal of this information from the translated public notices as the regulations put no limitations on this discharge information, except that it should be brief. Furthermore, in his written hearing testimony, Stephen Pullen, NMED's witness, described why the Department needed radiological data from well TP-31, when he explained, "[t]he Department requires this information so that it might ascertain ... the quality of groundwater in the OAG [groundwater zone]."<sup>76</sup> If radiological data is critical to ascertaining the quality of New Mexico groundwater, it is certainly appropriate information for the public as well. This PN-2

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<sup>72</sup> New Mexico Environment Department, WCS (DP-1817) hearing notice, *Fact Sheet Available*, issued by email July 9, 2018 (not entered into the Record) (provided in a file as "Exhibit 8")

<sup>73</sup> CARD and AFES Findings of Fact and Conclusions of Law, 9-28, (Exhibit 2)

<sup>74</sup> New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017, Administrative Record 02024 to 02027 (English provided in a file as "Exhibit 27;" Spanish as "Exhibit 28")

<sup>75</sup> New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) August 2018, 2 (2nd hearing fact sheet)(English provided in a file as "Exhibit 23;" Spanish as "Exhibit 24")

<sup>76</sup> New Mexico Environment Department's Statement of Intent to Present Technical Testimony, in the Matter of Waste Control Specialists LLC (DP-1817)[GWB 18-11 (P)] *Technical Testimony of Stephen Pullen*, 23, September 21, 2018 (provided in a file as "Exhibit 26")



also gives an incorrect volume figure of 300,000 gallons per day.<sup>77</sup> All references to the groundwater at 19 feet being the groundwater most likely to be affected by the discharge (as it is described in the draft permit) have been removed. No explanation is given for this removal.

Even though Spanish translation of public notices has begun, information is still being kept from Spanish speakers—information that is and has been available to English speakers. English speakers can learn about the groundwater at 19 feet and that there could be radionuclides in the discharge both through reading the draft permit and reading previous public notices. They can also find out about the PCBs and asbestos that could be in the discharge by reading the draft permit. LEP persons cannot. Not providing equally complete vital information about the discharge and groundwater to LEP persons compared to English speakers amounts to disparate treatment. This treatment had a disparate effect on LEP persons because it did not provide an equal and meaningful opportunity for them to participate in the DP-1817 process.

#### **November 17, 2017 Public Notice 2<sup>78</sup>**

The last PN-2 was published on November 17, 2017, and was also translated into Spanish. However, this notice included less information than any previous PN-2. PCBs, asbestos and radionuclides are all still missing from the description of potential discharge contaminants and no volume of any kind is given. The incorrect volume in the previous public notice is not corrected. NMED's handling of the permitting process continued to amount to disparate treatment and continued to have a disparate effect on LEP persons.

#### **June 5, 2018 First Hearing Notice<sup>79</sup>**

The first hearing notice was translated into Spanish. It noticed an August hearing date and provided about one page of additional information on the permit, the discharge and the facility. There is still no mention of the asbestos and PCB waste described in the draft permit.

Most of the public notice is taken up with describing hearing procedures but the notice does not make it at all clear that the public can provide comment or written statements except at the hearing itself in Eunice. All descriptions of how the public can participate refer to providing oral or written comments at the hearing. The notice goes on to say that the hearing will be conducted pursuant to 20.1.4.NMAC and

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<sup>77</sup> New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017, Administrative Record 02024 to 02027 (English provided in a file as "Exhibit 27;" Spanish as "Exhibit 28"); Oral Testimony of Stephen Pullen, In the Matter of the Application of Waste Control Specialists LLC for a Groundwater Discharge Permit (DP-1817) for the Waste Control Specialists LLC Facility, October 3, 2018

<sup>78</sup> New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, November 17, 2017, Administrative Record 02322 to 02323 (English provided in a file as "Exhibit 29;" Spanish as "Exhibit 30")

<sup>79</sup> New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, June 5, 2018, Administrative Record 02407 to 02413 (English provided in a file as "Exhibit 31;" Spanish as "Exhibit 32")



20.6.2.3110 NMAC. 20.1.4.300.B(2) NMAC allows written statements to be submitted before the hearing during the pre-hearing period. This information is not at all transparent and is "hidden" in the regulations making it appear that people have to participate at the hearing itself in Eunice to comment. You have to be pretty sophisticated about the regulations, internet research and the English language to be able to find this out.

Though this information is equally hidden in the English public notice, an English speaker can read and understand the regulations if they can find them. Even if an LEP Spanish speaker were to find the regulations, the regulations are in English and therefore inaccessible to them. In addition, although in April NMED had filled a full time position for an in-house Spanish language translator and interpreter to be available to the LEP public both for hearings and to assist LEP individuals generally,<sup>80</sup> only information on availability during the hearing was included in the notice. In fact, during the entire WCS public process, NMED never explained to the LEP public that such general language assistance was available; yet they complained that no one called to use this assistance after the notice was published and seemed to feel this proved that no one really wanted translation.<sup>81</sup>

Again, with this notice English speakers still had more information and access to information than Spanish speakers had. This disparate treatment also prevented LEP persons from learning that they could provide written comment during the 60-day pre-hearing period. This could have been explained to them by the in-house interpreter, but information on that option was not provided either. This treatment had a disparate effect on LEP persons because it did not provide an equal and meaningful opportunity for them to inform themselves and thus they could not participate in the DP-1817 process in an meaningful way.

### **First Hearing Fact Sheet<sup>82</sup>**

The first hearing fact sheet was created in June of 2018 and a "y public notice was published on July 9, 2018 just to notice the availability of the fact sheet in English and Spanish."<sup>83</sup> Links were provided in the online notice to English and Spanish versions of the hearing notice, English and Spanish versions of the fact sheet, and to an English version of the draft permit. It also re-noticed the public hearing. This fact sheet finally added a wealth of information for the LEP public. Even at this point, however, the total amount of information in Spanish consisted of about six pages and ten sentences. No primary documents at all had been translated including any of the short draft permits themselves, the Index of the Record or any documents from the Record other than notices and fact sheets. English speakers still had all of these and

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<sup>80</sup> Letter from Jennifer Hower, NMED General Counsel to Lilian Dorka, Director, External Compliance Program, Office of Civil Rights, U.S. Environmental Protection Agency, 2 (April 26, 2018)

<sup>81</sup> Personal conversation between Ex. 6, 7c and Michelle Hunter, Bureau Chief, Ground Water Quality Bureau, summer 2018

<sup>82</sup> New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) June 5, 2018 (1st hearing fact sheet-English)(provided in a file as "Exhibit 25")

<sup>83</sup> NMED WCS (DP-1817) hearing notice, *Fact Sheet Available*, July 9, 2018 (Exhibit 8)



thousands of additional pages of information about the discharge, geology, hydrology, the facility, the permit and more.

Though the summary of the geology and hydrology of the area is mostly quite good in this fact sheet, there is still no description of the groundwater at 19 to 35 foot zone though it is described in the permit as the "[g]roundwater most likely to be affected" by the discharge and as the "focus of the groundwater detection monitoring in this Discharge Permit."<sup>84</sup>

The fact sheet also still doesn't describe PCBs and asbestos as possible contaminants in the discharge. The description of the different parts of the facility is not very detailed and —most unfortunate of all—the description of the draft permit gives almost no information about the permit at all—only about how the different sections are organized. As with the hearing public notice, the fact sheet says that an interpreter will be available at the hearing but does not tell the public that the interpreter/translator is available to help them outside of the hearing as well.

This first hearing fact sheet makes no mention of community social, health or other concerns and makes no mention of the extensive oil and gas development and multiple other polluting facilities in the area.<sup>85</sup> No PIP was created for the DP-1817 process and nowhere in that process are these concerns and needs incorporated or even considered.

The continued missing information about the discharge and the groundwater at 19 feet as well as a permit description akin to a template outline, when all this information and more is easily available to English speaker, had a disparate effect on LEP individuals. This disparate effect was compounded when these individuals were not informed of the availability of an interpreter outside of the hearing and when nowhere in the process or in this fact sheet were LEP and minority community needs even mentioned.

#### **July 12, 2018 CARD/NMED agreement**

After the first hearing notice and fact sheet were issued, CARD was ready to file this Title VI Complaint because of NMED's continuing disparate treatment of LEP individuals who still had only one page and ten sentences of translated information available to them about the discharge. However, in an agreement reached during a July 12, 2018 meeting with NMED, CARD agreed to shelve the complaint if NMED would move the date of the hearing to October, translate the Index of the Record and provide a second fact sheet that truly represented all the vital information in the Permit.

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<sup>84</sup> Ground Water Discharge Permit ,Waste Control Specialists LLC (DP-1817) 3, June 9, 2017 (Exhibit 16)

<sup>85</sup> *Southeast New Mexico Threats Map*, Ex. 6, 7c Design, LLC, 2019 (provided in a file as "Exhibit 35;" Satellite map of Eunice, New Mexico and the surrounding area, Google Maps, 2018 (provided in a file as "Exhibit36")



**August 2, 2018 Second Hearing Notice<sup>86</sup>**

The second hearing notice was translated into Spanish. It noticed an October hearing date and provided about one page of information on the permit, the discharge and the facility. It also provided more complete information on how to participate in the hearing process. There was still no mention of the asbestos and PCB waste described in the draft permit, the groundwater at 19 feet or that an in-house interpreter/translator was available.

As with the first hearing notice, the second hearing notice did not provide an equal amount of information for LEP persons, to what was available for English speakers. This disparate treatment continued to have a disparate effect on LEP persons because LEP persons continued not enough information about the permit to provide them a meaningful opportunity o participate in the DP-1817 process.

**Second Hearing Fact Sheet<sup>87</sup>**

NMED issued the second hearing fact sheet in August of 2018 for the October 2, 2018 hearing. CARD had previously provided extensive comments to NMED on how to assure that the second fact sheet was truly representative of vital information in the draft permit, including pointing out passages of vital information that should be quoted word for word, which appendices should be included, and noting where the first hearing fact sheet did and did not include such representative information.<sup>88</sup>

Because NMED still refused to translate the entire short permit, this second hearing fact sheet was supposed to represent all the vital information included in the permit so that LEP persons would finally have the same information available to them that English speakers had.

However, NMED did not follow these suggestions in some significant ways and instead introduced new information that contradicted statements in the permit, changed the meaning in passages that were supposed to be quoted word for word, summarized some permit statements so their meaning was completely changed, did not include information that was critical for understanding the most basic aspects of the permit, and included incorrect information. A draft of the fact sheet was never provided to the LEP community or to any of their representatives for review before publication. This second hearing fact sheet did not provide LEP persons with all or even most of the vital information contained within the permit, so that critical vital information that was readily available to the English-speaking public continued to be unavailable to LEP individuals. This disparate treatment had the disparate affect on these individuals that they could not participate meaningfully and equally in the WCS permit process.

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<sup>86</sup> New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, August 2, 2018 (English provided in a file as "Exhibit 33;" Spanish as "Exhibit 34")

<sup>87</sup> New Mexico Environment Department, Hearing Fact Sheet, August 2, 2018 (English, Exhibit 23; Spanish, Exhibit 24)

<sup>88</sup> Comments on the June 2018 Fact Sheet & Suggestions for Translation and Information Inclusion in the Permit Summary Fact Sheet, July 17, 2018



Details of the deficiencies of the second hearing fact sheet are described in detail in CARD's and AFES' Findings of Fact and Conclusions of Law submitted after the WCS hearing<sup>89</sup> but a few of the worst examples are included here.

**1. The Second Hearing Fact Sheet Contradicts the Draft Permit**

Instead of summarizing the May 2017 Draft Permit, the second hearing fact sheet actually contradicts the draft permit. The permit states in plain language, that "[g]roundwater most likely to be affected is at a depth of between 19 and 35 feet." CARD and AFES had requested that this information be quoted in its entirety, but it was not. Instead, the Fact Sheet says that none of the groundwater above the 225-foot interval meets the regulatory definition of "ground water," and that the 225-foot zone is the first "protectible" groundwater. The fact sheet never says where the groundwater most likely to be affected actually is—even though the permit does. This entirely new concept is introduced in the fact sheet (that the groundwater at 19 feet isn't really groundwater) shortly before the hearing. Contradicting one of the main cornerstones of the permit in one of the few translated documents does not provide a true picture of the draft permit for LEP individuals.

**2. Contingency Plan Language Problems**

Another critical problem arose in how NMED treated information in the summary of the *Contingency Plan*. NMED's summary portrays that plan as being far more robust than it actually is. The *Contingency Plan* is also included as part of the *Closure Plan* which is another critical part of the permit. In CARD's comments on what vital information should be included in the second hearing fact sheet, we had asked that the *Contingency Plan* be summarized so as to "... include any timeframes or deadlines..."<sup>90</sup> This request was not followed. The fact sheet states that under the *Contingency Plan*, well sampling to establish existing conditions will have to take place over a "specified" amount of time. However, in the third draft permit, though there are specified timeframes for creating workplans, WCS is allowed to take whatever amount of time they deem "sufficient" to establish existing conditions through sampling. No timeframes for sampling and analysis are specified.

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The draft permit also allows WCS to establish these "existing conditions" *solely* by sampling existing and saturated wells in the groundwater zones. In contrast, the fact sheet says that they *must also* provide historical data from other sources. CARD and AFES considered the requirements in the *Contingency Plan* to be insufficient and controversial. As our hydrologist pointed out, the wording NMED was using in the permit created a situation where WCS could use future existing conditions of contamination that had actually been caused by WCS' discharge, as baseline conditions against which they could measure future discovered contamination. And WCS could take as long as they wanted to

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<sup>89</sup> CARD and AFES Findings of Fact and Conclusions of Law, 22-28, October 19, 2018 (Exhibit 2)

<sup>90</sup> Comments on the June 2018 Fact Sheet & Suggestions for Translation and Information Inclusion in the Permit Summary Fact Sheet, 4 (July 17, 2018)(provided in a file as "Exhibit 37")



"prove" whether contamination they had created was above baseline. Exact wording was essential to understanding whether or not the *Contingency Plan* was effective as it was the wording that was controversial. NMED changed the meaning of *Contingency Plan* requirements completely in the fact sheet by leaving out the word "or" and mischaracterizing time limitations for testing as being specified when they were not. This provided LEP persons an inaccurate view of vital information included in the permit. English speakers could easily read the whole draft permit and thus had a complete picture of the strengths and weaknesses of this critical information. LEP persons could not.

### **3. Refusal to Include Appendix A and Appendix C in the Fact Sheet**

Perhaps the most egregious example of permit information that was missing in the second hearing fact sheet was NMED's refusal to include either *Appendix A* or *Appendix C* in the fact sheet. This, despite CARD's statement in the cover email to our comments to NMED which noted that, "...our hydrologist particularly mentioned ... *Appendix A* and *Appendix C* as being especially critical information."<sup>91</sup> *Appendix A* is the list of constituents or analytes that is the heart of the monitoring program. *Appendix C* is the *WCS Facility Map* and shows the layout of the facility, and includes surrounding polluting facilities like URENCO, Sundance Landfarm and the Lea County Landfill. It also shows the outfalls, NM-1, the only NMED regulated monitoring well, and two other WCS monitoring wells, as well as hydrological flow paths. There is a wealth of additional information in the legend, chart and notes that is not available in any of the public notices or fact sheets. This is critical, vital information that was readily available for English speakers but completely denied to LEP Spanish speakers. Without these appendices LEP persons cannot understand the most basic aspects of the Permit. The denial of this information to LEP persons amounted to disparate treatment and had the affect that they were unable to inform themselves about the permit and participate in the permit process in a meaningful way.

#### **(b) The Translated Index**

NMED also agreed to translate the Index of the Administrative Record to make at least one primary document available to LEP Spanish speakers. The theory was that LEP individuals could look at the Index and see if there were any documents about which they wanted more information. They could then call up or go to NMED's office and ask for the translator to help them access the additional documents or talk, through the interpreter, with a technical person who could answer questions. However, the Index was not provided in a timely manner and was never actually noticed and made available to the LEP public.

Despite NMED's statements to the contrary, though the English Index was posted on NMED's website on August 8, 2018, the Spanish translation was not posted online until almost a month later.<sup>92</sup> The translated Index was also never added to NMED's

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<sup>91</sup> Email from Ex. 6, 7c to Lara Katz, NMED, *Re-Comments and Suggestions for Information Inclusion in the New Fact Sheet*, July 17, 2018 (provided in a file as "Exhibit 38")

<sup>92</sup> Affidavit of Ex. 6, 7c WCS discharge permit (DP-1817) September 17, 2018, #14, September 17, 2018



English-Spanish binder at the Eunice Public Library—again, contrary to NMED testimony—only a second copy of the English Index was included.<sup>93</sup> No member of the LEP public, for whom the Index was translated, or their representatives, were informed of the availability of the translated Index. As far as LEP Spanish speakers were concerned, it's as if the translation had never existed.

Because of the cumbersome process required of LEP Spanish speakers to gather information from NMED, they needed more time, not less, to inform themselves. The lack of timeliness in posting the translated Index was prejudicial. NMED additionally obstructed participation by Spanish speakers and treated them disparately when none of them was noticed that the translation was available, none was informed that a translator was available, and when and all NMED's phone answering system was in English, including the phone for the non-discrimination coordinator. This disparate treatment had a disparate effect on LEP individuals in that it was significantly more difficult for them to inform themselves and communicate with NMED about the permit than it was for English speakers. this hampered their ability to participate fully in the hearing process.

**(c) NMED did not inform the LEP public about new documents and translations**

NMED never informed anyone in any public notice that English and Spanish Fact Sheets were available online, or that the Spanish translation of the Index was available or that it even existed. NMED stated that it is not their responsibility to inform the public of changes, corrections, new documents or translations. They presume that it is the public's responsibility to check the website often to see if any of these materials have been posted or changed and to inform other members of the public that these items are available.<sup>94</sup> Yet the lack of Spanish information and explanations on the website makes this effort impossible for LEP individuals.

NMED is also being disingenuous when they say it is not their responsibility to inform the public of new documents and translations, as they do sometimes notice the availability of these items as evidenced by their provision of a supplemental public notice to the first hearing notice just to announce the availability of a new fact sheet and its translation.<sup>95</sup> NMED's refusal to provide notice of some translated documents but not others was arbitrary and capricious and amounted to disparate treatment as the lack of notice of the availability of translations made them unavailable to LEP persons. This continued the disparate effect that Spanish speakers had access to far less information than English speakers did and were unable to inform themselves and to participate in a meaningful way in the DP-1817 process. NMED's belief that it is not their responsibility to announce the availability of translations is also a systemic problem as it amounts to a program-wide, informal policy.

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<sup>93</sup> Contents of NMED binder for English and Spanish DP-1817, Eunice Public Library(October 4, 2018)(Exhibit 6)

<sup>94</sup> NMED Response to CARD and AFES Motion for a Continuance, 13-14, September 28, 2018 (Exhibit 7)

<sup>95</sup> NMED WCS (DP-1817) hearing notice, *Fact Sheet Available*, July 9, 2018 (Exhibit 8)



NMED did not meet the obligations they agreed to meet with CARD. Their actions were not accurate, representative of the permit, nor timely. Therefore CARD, AFES and the other complainants have continued with the filing of this Title VI Complaint.

**(4) NMED continues to have a statewide pattern and practice of discriminatory permitting and lack of access for LEP residents to the permitting process**

NMED has made some progress with non-discrimination since the 2002 Title VI complaint for Triassic Park was filed but that progress has been extremely limited. NMED no longer screams at community leaders, telling them to, "Shut up and sit down!" But they are still obstructing public participation, denying LEP individuals access to vital documents, ignoring the health, history, concerns and needs of LEP and minority communities, and thus refusing to consider social and discrimination concerns when deciding whether to approve a permit. These are the same complaints that were expressed in 2002. Almost 20 years have passed and very few of the important things have changed. Complainants must still fight for every translated word; NMED picks and chooses which regulations it will follow, and ignores legal decisions made years ago about social concerns, public notice and disparate impacts. That these problems persist in multiple permits across the state shows that NMED still has a statewide pattern and practice of discrimination.

The Resolution Agreement is a tool to help NMED meet their Title VI obligations. However, NMED has diverged from the Agreement and as a result, has practiced discriminatory acts. Showing how far NMED has diverged from meeting Agreement requirements is a simple way of showing how they are discriminating. As examples we will describe problems in the permitting process for eight permits from three Bureaus (Hazardous Waste, Solid Waste and Groundwater Quality).

Five of these permits are in southeastern New Mexico:

1. DP-1817, the WCS discharge permit in Lea County
2. DP-1481, the URENCO USA discharge permit renewal in Lea County
3. The Lea County Landfill solid waste facility permit renewal in Lea County
4. EPA No. NM4890139088, the WIPP TRU Mixed Waste Disposal Volume Reporting permit modification ("Volume Mod") in Eddy County
5. EPA No. NM0001002484 the Triassic Park hazardous waste facility permit renewal in Chaves County

and three of these permits are in northern and central New Mexico:

1. DP-1132, the LANL discharge permit in Los Alamos County
2. DP-1793, another LANL discharge permit in Los Alamos County
3. DP-1012, the Special Waste Disposal, Inc. discharge permit renewal in Torrance County.

The process for some of these permits began years ago and some are more recent. Most are "important" permits and some could even be considered to be controversial. There is certainly a statewide interest by LEP and minority individuals at least in those that are "important" and controversial. In all of these cases, very little information has been



provided in Spanish—sometimes only a few pages or only a few lines of text—despite the fact that these facilities are complex and that virtually all are in geographic proximity to significant Spanish speaking populations. In addition to these examples, there are many other permits that also don't meet Resolution Agreement requirements—the GWQB alone regulates five or six hundred permits—but the examples here should suffice to show the state of public participation in New Mexico.

**(a) Policies**

NMED created three policies in February of 2018 to implement the Resolution Agreement: a Public Participation Policy, an LEP Accessibility and Outreach Policy and a Disability Accessibility and Outreach Policy. Although NMED said they understood that meaningful public involvement consists of "...informing, consulting and working with communities at various stages of the environmental decision-making process" so as to address their needs,<sup>96</sup> NMED not only did not involve the LEP and minority public in creating these policies that were supposed to address LEP and minority issues, but also refused to accept any public input from these communities at all, saying creating the policies was an "internal matter" in which no outside groups could be involved. In fact, NMED was happy to receive and incorporate input from the state workers' employee labor union which is also a group external to NMED. They were just not happy to incorporate input from LEP and minority communities, environmental groups or environmental justice groups. This was despite NMED being directed to "make a concerted effort to create partnerships ... to share information" with all three stakeholders and more in the Resolution Agreement.<sup>97</sup>

This has resulted in policies that are severely flawed, don't involve or even connect with communities, don't follow EPA guidelines and don't implement the provisions of the Resolution Agreement. NMED is still not meeting their Title VI obligations. Problems with these policies were detailed in the March 12, 2018 Letter from the Yale Law School Environmental Justice Clinic on behalf of CARD to Lilian Dorka of EPA's ECRCO<sup>98</sup>. In December of 2018, 21 groups asked yet again for the community to have input into NMED's policies. NMED has responded directly to neither of these letters.<sup>99</sup>

**(b) PIPs—NMED does not understand the communities' needs and concerns, or their history, and background.**

NMED relies on Public Involvement Plans to create a description of communities and to understand and address communities' needs and concerns. Although a good PIP could do this, again, NMED has refused to allow any public involvement in their

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<sup>96</sup> Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 11, Jan. 19, 2017 (Exhibit 1)

<sup>97</sup> *Id.* at 11, footnote 16

<sup>98</sup> Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, March 12, 2018 (Exhibit 20)

<sup>99</sup> Letter from the UNM School of Law Natural Resources and Environmental Law Clinic and 21 groups to Jennifer Hower, General Counsel, New Mexico Environment Department, *Re: Second Request for Community Input on NMED's Public Participation and Limited English Proficiency Policies*, December 17, 2018



Public Involvement Plans from LEP and minority communities whose concerns and needs the PIPs are supposed to address. As was said in the March 2018 letter, "While the EPA...Guidance repeatedly mentions fostering a climate of inclusivity, NMED continues to distance itself from the concerns and needs of the public."<sup>100</sup> Since they don't include any input about their history, background, needs and concerns from communities of Hispanic or Mexican descent (except for some translation needs), the PIPs as NMED is creating them, fall short of requirements in the Resolution Agreement to address these needs and concerns.<sup>101</sup>

Though the PIPs provide some demographic information that can be used in deciding the need for translation, NMED's refusal to look at translation needs and budgeting on a programmatic level, plus their reliance on EJSCREEN and small target areas to determine where to investigate these needs has created problems even for translation and public participation needs—the only needs that the PIPs even attempt to address. PIPs include no plan or process to gather information about community needs, concerns, background or history beyond translation and some participation needs; nor is there any formal way for communities to review or appeal any aspects of the PIPs. Sometimes PIPs even seem to be created just to exclude community concerns.

The WIPP hazardous waste Volume Mod PIP is a case in point.<sup>102</sup> The PIP used a 15-mile radius from the site, ignoring that the WIPP radioactive and hazardous plume released from the explosion in 2014 traveled and contaminated more than 100 miles from the site. This release was of great concern not only to LEP persons in the contaminated area but also to many LEP individuals across the state, but this concern was never mentioned or addressed in any permitting documents. In fact, during the hearing for this permit, NMED denied that contamination traveled more than 15 miles from the site even though they provided no scientific basis to support that belief.<sup>103</sup>

The 15 mile EJSCREEN radius also missed the largest city in the area, Carlsbad and the proposed Holtec Consolidated Interim Storage site for spent fuel rods and high level waste which is 16 miles north WIPP. Again, the Holtec site and WCS, which is another proposed CIS site in the area, are major concerns in southeast New Mexico as it is estimated that together the two sites have generated more than 60,000 comments to the NRC about these proposed high level waste storage facilities and their transportation. The PIP also said nothing about the enormously high cancer mortality rate in the area—higher than in any other area of New Mexico. Despite sending NMED maps and comments about this mortality rate for years, NMED still appears not to understand the public health concerns in the area. There is no plan in the WIPP

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<sup>100</sup> Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, 9, March 12, 2018 (Exhibit 20)

<sup>101</sup> Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 11-12 (Jan. 19, 2017)(Exhibit 1)

<sup>102</sup> New Mexico Environment Department, Hazardous Waste Bureau, Public Involvement Plan (PIP) for the WIPP Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July, 2018, <https://www.env.nm.gov/wp-content/uploads/2016/05/FINAL-PIP-WIPP-Class-3-VOR-7-26-2018.pdf> (last visited on June 3, 2019)(provided in a file as "Exhibit 43)

<sup>103</sup> WIPP Volume Mod transcript, 35, October 25, 2018 (Exhibit 13)



Volume Mod PIP or anywhere to address these community concerns or to determine community needs. None of these concerns is mentioned in any public notice, permit, PIP, fact sheet or any other document.

By leaving out Carlsbad and other small communities for inclusion in their language needs analysis it was concluded that Spanish translation wasn't needed when, in fact, southeastern New Mexico actually has a high percentage of Spanish speakers and LEP persons. Thus, the fact sheet was not translated nor was interpretation even offered for the hearing despite intense public interest in WIPP throughout the state that has persisted for decades. This exemplifies the problem of not analyzing and budgeting for language needs state-wide for "important" permits.

Similar problems exist for the URENCO USA discharge permit PIP which uses a six mile radius for its EJSCREEN analyses. This leaves out the town of Hobbs and several smaller nearby communities. Though translation is provided for in the PIP, budgeting for translation is limited as it is based, again, on the local instead of the programmatic level. The PIP says translation will be "... arranged to the extent possible," "... as resources allow," and that NMED will "... strive to make public participation efforts as inclusive as possible within the Bureau's budget and time limitations." They also state that if more language services are needed beyond those described in the PIP that "... the budgetary implications will be reviewed," and say that fees collected from URENCO are not sufficient to cover translation and interpretation costs.<sup>104</sup> Interestingly, NMED considered raising fees last year but decided against it.

The same budget limitations and even some of the same language are written into the Special Waste Disposal, Inc. discharge permit PIP.<sup>105</sup> That PIP uses only a four-mile radius for their EJSCREEN area which is the usual area NMED considers for affected communities.<sup>106</sup> This area is so small that it encompasses only 22 people, 55% of whom are Hispanic. Both the URENCO and Special Waste Disposal PIPs say that all public notices will contain a statement that non-English speakers may call the Bureau contact and request language assistance to learn more about the permit or permitting process and that arrangements may be made for document translation as necessary and "as resources allow" or "to the extent possible." Yet as of the May 24, 2019

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<sup>104</sup> New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for URENCO USA (DP-1481) 2, 3, 5 and 10, February 22, 2019, [https://cloud.env.nm.gov/water/resources/\\_translator.php/7IFzxx/tEqyLuZE/AuGSilz7T1GuJdorzUzbSVQGgzPcDtLgBBGRzghnxhOgXMH6U4KGqgMcb9FXUh8wDimK7gDgtal1PR8Hj7lxEdg6iCl=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/7IFzxx/tEqyLuZE/AuGSilz7T1GuJdorzUzbSVQGgzPcDtLgBBGRzghnxhOgXMH6U4KGqgMcb9FXUh8wDimK7gDgtal1PR8Hj7lxEdg6iCl=.pdf) (last visited on June 3, 2019)(provided in a file as "Exhibit 41")

<sup>105</sup> New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for Special Waste Disposal, Inc. (DP-1012) November 13, 2018, [https://cloud.env.nm.gov/water/resources/\\_translator.php/sv5kXkHMN0qJjuZvBPd+Pjqp3arcmvEnPifHL17JgnnMlvAjEKX0PtHBHl8Tt2Gz6gythyvyc9cL/s9PNSLbas3+51zLY/gty6Z1W1OfqwU=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/sv5kXkHMN0qJjuZvBPd+Pjqp3arcmvEnPifHL17JgnnMlvAjEKX0PtHBHl8Tt2Gz6gythyvyc9cL/s9PNSLbas3+51zLY/gty6Z1W1OfqwU=.pdf) (last visited on June 3, 2019)(Provided in a file as "Exhibit 40")

<sup>106</sup> LANL DP-1793 transcript, 332-333, November 8, 2018 (Exhibit 12)



Public Notice-2 for the Special Waste Disposal discharge permit and 22 other permits in the Ground Water Quality Bureau, this information was still not included in public notices.<sup>107</sup>

Both PIPs include "Element 4 - Description of Community/Stakeholder Groups, but in fact, no stakeholder groups are described and NMED admits that this "description" does not come from contact with such groups or communities but is based on EJSCREEN. the Special Waste Disposal PIP says that appropriate public outreach was identifying if there were a combination of environmental and demographic factors that may impact public participation, yet no environmental factors are actually included. Only participation and translation needs are assessed in any PIPs. No other community concerns, needs, history or background are ever considered.

Even if NMED's PIPs were better, PIPs are not developed for each activity requiring public participation as is required in the Public Participation Policy. PIPs were not created for the LANL DP-1132 Radioactive Liquid Waste Treatment Facility discharge permit, or for the LANL DP-1793 discharge permit (land application of treated chromium /perchlorate/RDX waters). No PIP was created for the WCS DP-1817 discharge permit or for the Triassic Park hazardous waste permit. Sometimes NMED claims that it is too late to do a PIP as the permit process had been going on for years, yet the WIPP permit process had been ongoing for almost 20 years and NMED created a PIP for that. NMED claimed they didn't need to do a PIP for WCS as they already understood community concerns. But as was described above, they did not.

### **(c) Vital Documents**

NMED refuses to define vital documents and translate them. Thus, translation is still greatly limited for all programs and actions and most vital information regarding permits and facilities that is readily available to the English speaking public continues to be unavailable to the LEP public in all permit hearings. This disparate treatment of LEP individuals has had the disparate effect of making it impossible for them to participate in a meaningful way in the permitting processes for all NMED-regulated facilities.

As an example, during the WIPP Volume Mod permit process only the two public notices were translated into Spanish, providing about 5 pages total of information in Spanish about the permit and the facility. Because the target area was limited in

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<sup>107</sup> New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, [https://cloud.env.nm.gov/water/resources/\\_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSuc5+qFQDhUkAiQiAs/jST8KxTkj1BfdAQV7Ju0LwCIQfSa662EYK5/JUU0XMnfly0=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSuc5+qFQDhUkAiQiAs/jST8KxTkj1BfdAQV7Ju0LwCIQfSa662EYK5/JUU0XMnfly0=.pdf) (English)(last visited on June 3, 2019)(provided in a file as "Exhibit 44"); New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, [https://cloud.env.nm.gov/water/resources/\\_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSt2yW+oyABm9ZpdXuwmihnWG/G9XWEVlll5Urd3OtPXRBFMMZ504VjJdwLG1s0pLiQ=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSt2yW+oyABm9ZpdXuwmihnWG/G9XWEVlll5Urd3OtPXRBFMMZ504VjJdwLG1s0pLiQ=.pdf) (Spanish)(last visited on June 3, 2019)(provided in a file as "Exhibit 45")



EJSCREEN to a 15 mile radius from WIPP instead of including NMED's program area, and it was determined that there was no need for Spanish translation,<sup>108</sup> a fact sheet was created for English speakers, but was never translated into Spanish. There was also no mention in the public notices that an interpreter/ translator was even available or that LEP persons could request an interpreter at the hearing. WIPP is a complex facility including both hazardous and radioactive waste, sited in a complex geological area and includes extensive facility transportation. It is sited near significant Spanish speaking populations and minority community members, many just a few miles beyond the 15 mile radius. There is also significant interest in the WIPP permit in LEP and minority communities across the state, especially when they are in close proximity to WIPP transportation routes. Again, English speakers had access to hundreds, if not thousands of pages of additional information including the fact sheet, the draft permit and the Administrative Record. The information in the five translated pages provided for Spanish speakers was far less than the information provided for English speakers and amounted to disparate treatment of LEP individuals. That disparate treatment resulted in the disparate effect that LEP persons could not inform themselves adequately to participate in the permitting process in a meaningful way.

Similarly, only public notices were translated in the two LANL groundwater discharge permits as well. No other vital documents or summaries of documents were translated. A PIP was not created for either public process so it's hard to understand how NMED came to the conclusion that no additional translation was needed, when LANL is surrounded by a high concentration of both Hispanic and Native New Mexicans. In fact LANL is surrounded by the highest or one of the highest concentrations of minority community members at any DOE site. Because of the different communities involved, both Spanish and Native language translations might have been needed to fully inform potentially affected communities. English speakers could read the permits themselves, the regulations and other documents in the Record, but LEP individuals only had the minimal information in the public notices. Again, this disparate treatment led to the disparate effect that minority community members could not participate equally and fully in the permit processes.

Finally, as described above, the WCS process only provided a few sentences and pages of information in Spanish until almost the end of the process. When forced to provide a more comprehensive fact sheet for DP-1817, NMED did not ensure that all vital information in the permit was accurately translated as required by the Resolution Agreement, but provided public notices and a fact sheet that were severely flawed, yet were the only information provided for non-English speakers. Both the quantity and the quality of information provided to LEP Spanish speakers was diminished compared to what was available for English speakers. Again, disparate treatment led to the same disparate effect that LEP persons could not participate equally in this permit process.

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<sup>108</sup> New Mexico Environment Department, Hazardous Waste Bureau, WIPP Volume Mod PIP, July, 2018 (Exhibit 43)



**(d) No Notification of LEP services or translated documents**

NMED does not notify the LEP public of available language services and translated documents. NMED hired an interpreter/translator to provide language assistance in-office, by phone or by email but only noticed the availability of this interpreter for hearings when they were actually available to provide language assistance at any time. When NMED translated the WCS Record Index and the second fact sheet, the LEP community was never told of their availability. NMED has stated that it is not their responsibility to inform the public or the LEP public of the availability of corrected or changed documents, new documents, large revisions to the Record or translations. This is a program-wide informal policy. NMED does sometimes notice the availability of new documents or translations but provides such notice irregularly and in an arbitrary and capricious manner. Notification is critical as without notification of the availability of translated documents, an interpreter, etc., these documents and service are inaccessible to LEP individuals and might as well not exist.

**(e) Inaccessible Phone System and Website**

Participation in NMED's programs and activities is also limited by NMED's inaccessible phone system and website. There is no Spanish option in their phone menu, even for the non-discrimination coordinator's phone. The website is even more limited as most pages by far are in English. Even on the home page there is very little information in Spanish.<sup>109</sup> News releases on the Homepage are in English and Spanish and there are links in Spanish on how to file a non-employee discrimination complaint, how to request public information and how to report an environmental issue or incident. That's it. Everything else is in English including all information on Programs, Businesses, Tools & Maps, Regulatory Resources, and Boards & Commissions. Even the link to the Resolution Agreement and the three Policies is now only in English. When you click that link, the Resolution Agreement has been removed and English speakers have five documents available to them whereas Spanish speakers only have the three policy documents. The link to request public information also leads to three more documents in English than Spanish speakers have. Some other pages on the website have Spanish sections and some also have programs that will read the page for visually disabled visitors. The reading is awkward though understandable in English, but almost unintelligible in Spanish and reads all the numbers in the Spanish section in English.

The website is listed in PIPs as a primary outreach tool but clearly, because of the dearth of translated material, vital information regarding facilities and permits that is readily available to the public in English is not available to the non-English speaking public. This amounts to disparate treatment and has led to the disparate effect that Spanish and other non-English speakers cannot inform themselves to the same level that English speakers can and therefore cannot participate in NMED's programs and actions in an equal and meaningful way.

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<sup>109</sup> NMED Homepage, <https://www.env.nm.gov> (last visited June 3, 2018)



**(f) The need for translation and budgeting for language services is not analyzed at the programmatic or statewide level in conformance to federal guidelines**

Many of the facilities we have been describing, and others in New Mexico, are controversial. There is statewide interest, including by LEP persons, in their permits and in how NMED is allowing development to change the state. When discharge permits are involved there is a great interest in how our groundwater is being protected as it is such a scarce resource in this state. Many regulated facilities like WIPP, Triassic Park, LANL etc. have facility transportation that can create a disparate effect in LEP and minority communities far from the facility site. For instance, according to information in the WIPP SEIS II and in Environmental Evaluation Group reports, the transportation phase of the WIPP project is responsible for almost all of the negative health effects of the entire WIPP project during normal operations. NMED's insistence on analyzing the need for translation and public participation only at the local or facility level instead of at the state or programmatic level has resulted in a lack of access to information for LEP individuals across the state for some of these permits. As examples above show, PIPs constantly describe having to limit translation and outreach because of budgetary concerns. NMED cannot issue permits to expand industry and the statewide effects that come with that while simultaneously limiting representation and invoking a cost argument to limit translation. Doing so has had a disparate effect on LEP persons and particularly on those who do not live within a short distance from the facility or discharge point.

**(g) Limiting LEP and community needs because of low "historic participation" only increases the disparate effect on Hispanic and LEP individuals**

The LEP Policy provides that NMED employees "...assess historical participation...to evaluate whether there was participation by LEP individuals in the past."<sup>110</sup> This reasoning violates federal guidelines and the 2017 Resolution Agreement. Current guidelines require recipients like NMED to assess LEP community needs at a programmatic level instead of reviewing on a case by case level.<sup>111</sup> Limiting which Hispanic communities should have language and community services now because of low turnout in the past is really adding insult to injury considering how much NMED has historically obstructed public involvement by this segment of the public. Federal guidance says that "... involving the public early and often, is essential for the success of any permitting program" and encourages recipients to "...get feedback from as many members of the affected community as possible...",<sup>112</sup> but by the time NMED provides even minimal information to LEP communities, the process is often too far along for them to have any influence on the outcome.

Most public notices have only recently started to be translated into Spanish (except in the Solid Waste Bureau which seems to have had somewhat better outreach to LEP communities)<sup>113</sup> Therefore, historically, it was almost impossible for LEP persons even to find out that a permitted facility or discharge was planned nearby. Even with

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<sup>110</sup> New Mexico Environment Department, LEP Policy, February 6, 2018 (Exhibit 11)

<sup>111</sup> EPA LEP Guidance, 69 Fed. Reg. at 35,606 (Exhibit 18)

<sup>112</sup> EPA Public Involvement Guidance, 71 Fed. Reg. at 14212 (Exhibit 19)

<sup>113</sup> New Mexico Environment Department, Solid Waste Bureau, Lea County Landfill PIP, June 5, 2018 (Exhibit 42)



facilities that generate considerable public interest it is usually not possible for NMED to know what portion of that interest comes from LEP individuals.<sup>114</sup> Further reducing public involvement by LEP communities by reducing language services will not help NMED meet their Title VI obligations and only increases the disparate effect that NMED's actions have had on LEP and minority communities who have been left out of the process in the past, making it even more difficult for them to participate in a meaningful way now or in the future.

**(h) Insufficient non-discrimination training**

Each of NMED's three policies requires training. These policies directly affect the LEP, minority and disabled public but those communities were not allowed to be involved in creating the curriculum for the non-discrimination training or to know what that curriculum is. That the training does not fully cover all important aspects of non-discrimination, however, is clear. The ruling in *In re Application of Rhino Env'tl. Services*<sup>115</sup> made it clear that social concerns, including environmental justice and civil rights concerns must be considered in the permitting process. Yet about a month after going through the non-discrimination training, David Cobrain, project manager for the Triassic Park hazardous waste facility permit, stated during a pre-hearing conference that he didn't need to consider social or environmental justice concerns but only the technical requirements of RCRA in a permit process.<sup>116</sup>

During the DP-1793 permit hearing, NMED said the hearing was not the "forum" where Resolution Agreement requirements and civil rights concerns were "to be litigated," that the Resolution Agreement was "entirely outside of the scope of this discharge permit" and would not allow cross examination about civil rights and social concerns.<sup>117</sup> During the WIPP Volume Mod hearing, NMED also claimed that problems with the PIP and questions about exposure information required by C.F.R. §270.10 (j) and possible disparate impacts were "not related to the [Volume Mod]," that similar civil rights issues were "not relevant" and that "...there is a process to submit public comment on the [PIPs]..."<sup>118</sup> Clearly, the non-discrimination training has not impressed upon NMED employees that social and civil rights concerns are an important part of the permitting process.

Employee non-discrimination training that falls short and allows those employees to give incorrect information or even stop public participation relating to civil rights and social concerns amounts to disparate treatment and creates a disparate effect on LEP and minority persons and communities as it keeps their concerns and needs from

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<sup>114</sup> New Mexico Environment Department, Ground Water Quality Bureau, URENCO USA PIP, 9 (February 22, 2019)(Exhibit 41)

<sup>115</sup> *In re Application of Rhino Env'tl. Services*, 2005-NMSC-024, ¶¶ 22-24.

<sup>116</sup> Conversation between Ex. 6, 7c and David Cobrain, Triassic Park Hazardous Waste Facility Permit Renewal, pre-hearing conference calls, summer 2018

<sup>117</sup> LANL discharge permit hearing transcript (DP-1793), 329-334, November 8, 2018 (Exhibit 12)

<sup>118</sup> WIPP Volume Mod transcript, 35, 27-29 and 41-44, October 25, 2018 (Exhibit 13)



being addressed and severely limits their ability to influence the outcome of the permit process.

**(i) LEP individuals and the public at large were not involved in the creation, review or correction of Policies, PIPs, the definition of vital documents, summaries of vital information, fact sheets or translations.**

The LEP and minority communities (and the disabled public) have not been allowed to have any involvement in creating the three policies that are supposed to implement the Resolution Agreement. This has resulted in severe shortcomings in all three policies that possibly could have been avoided. These communities are also prohibited from any involvement in creating the PIPs which also have multiple problems. Despite the policies and PIPs having been created to implement the requirements in the Resolution Agreement so that disparate treatment of these groups by NMED will cease, there is no formal process for these communities to review and correct either the policies or the PIPs. Instead, anyone can submit suggestions or comments to NMED's General Council. NMED is under no obligation to use these suggestions or even to let the writer know that the comments have been received. Indeed, when letters with suggestions or comments have been submitted to NMED—one signed by more than 20 environmental and environmental justice groups—NMED has not responded directly or let any of the writers know if their suggestions are planned to be incorporated or are even under consideration.

Because NMED has not yet shown that it can provide the LEP and minority public with accurate and timely translations and fulfill the provisions of the Resolution Agreement, it is imperative to have some type of timely and formal review/appeal process that is part of the permitting process itself, for NMED's decisions of what constitutes a vital document, what is an "important" permit, summaries of vital documents, fact sheets and translations. Each of these is an element in providing the information needed by LEP, minority and disabled individuals to inform themselves and make sure their needs and concerns are included. The WCS permit process is an example of how the quality of information can be diminished for LEP individuals in relationship to information available to English speakers when these individuals or their representatives are not able to review and correct documents before they are published. The second hearing fact sheet was created specifically to provide LEP persons with all vital information included in the permit, but it was riddled with inaccuracies and omissions which were never reviewed or corrected before it was translated and published. LEP individuals *only* had this flawed summary of the permit available to them while English speakers could read the permit itself.

Not allowing any involvement by the LEP and minority communities (or the disabled community) in the creation of Policies and PIPs and having no formal way for these communities to review and correct inaccurate or insufficient policies, PIPs, summaries, fact sheets, translations or to help define which documents are vital documents and which permits are "important," goes against the very purpose of the Resolution Agreement and allows these communities to be shortchanged with limited and sometimes inaccurate information. Without such a review process, LEP



individuals and communities, as well as their allies and advocates, have no way to appeal decisions that leave them with less than a fully meaningful opportunity to participate in the permit process.

- (j) NMED is not ensuring that all hazardous waste permit applications contain all necessary components required by 40 C.F.R. §270.10(j)—exposure information**  
In the Resolution Agreement NMED committed to ensuring that *all* hazardous waste permit applications contain all the information required by 40 C.F.R. §270.10(j) for exposures from hazardous waste facilities and their facility transportation during normal operations and during accidents. In New Mexico, most of these facilities and much of their facility transportation is in geographic proximity to significant minority populations. For hazardous waste facility permitting not to be discriminatory, it must be clear that there will be no disparate impacts on potentially affected LEP or minority communities. Without obtaining accurate exposure information about these facilities and their transportation it is impossible to figure any potential disparate impacts.

Despite NMED's commitment to "Section (j)" in the Resolution Agreement, during the Triassic Park hazardous waste permit pre-hearing conference calls in summer of 2018, Dave Cobrain, the project manager said that exposure studies weren't necessary for Triassic Park because all the RCRA waste at the facility had to meet Land Disposal Standards and thus was enclosed in containers. This, however, was disingenuous because Mr. Cobrain well knew that not all of the waste was regulated by RCRA and that the daily cover for the hazardous and toxic landfill was planned to consist of loose PCB-contaminated soils that were to be sprayed with contaminated leachate for dust suppression. Combined with the area's high winds, this was a recipe for exposure. When confronted with the complete facts, he shifted to say that the permit provisions were so protective that they *were* the study. When this argument was challenged, Mr. Cobrain simply started reading sections of the permit on loading and unloading.

Mr. Cobrain had made the same statement (that all the RCRA waste was enclosed), to the public during a previous October 2016 information meeting in Roswell, where he also used the argument that they couldn't study effects from facility transportation because the facility hadn't been built yet. Clearly no effects studies had been done or were contemplated for the Triassic Park renewal application despite NMED "confirming" in the Resolution agreement that for the Triassic Park facility it had "...carefully reviewed the pending permit application and determined that the application contains all necessary components of permit applications as required by 40 C.F.R. §270.10 including Section (j) related to 'exposure information,' and any necessary follow-up has and will be taken to ensure protection of human health and the environment."<sup>119</sup> Since the 2018 calls, NMED has not said if it has changed its position that exposure information isn't necessary for the Triassic Park application,

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<sup>119</sup> Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 5-7 (Jan. 19, 2017)(Exhibit 1)



has not said if exposure studies are being undertaken, or if they are even contemplated for the future.

During the WIPP Volume Mod hearing, when asked about whether exposure information had been gathered for the modification (which increased waste volume at WIPP by about 30% and increased facility transportation of mixed transuranic waste to WIPP by about 12,000 shipments), NMED said that exposure information was not "relevant" to the modification, that it wasn't necessary to do such effects studies for modifications, and that such exposure information was already part of the original application (more than 20 years old).<sup>120</sup>

NMED is clearly not making sure that *all* hazardous waste permit applications include Section (j) exposure information. NMED does not see the need to understand how exposures coming from NMED permitted facilities affect minority communities, to limit the density of such facilities, or to see if any of these facilities, discharges and facility transportation, singly or together, are having a disparate effect on LEP individuals or on minority communities. Yet the highest cancer mortality rate in the state is concentrated in southeast/south central New Mexico—and only there—in an area with a high percentage of individuals of Hispanic and Mexican descent, a heavy density of permitted and unpermitted facilities and discharges, and a huge amount of hazardous, radioactive and toxic transportation. Both the WIPP and Triassic Park hazardous waste facilities are in southeastern New Mexico.

**(k) Southeastern/south central New Mexico, an area with a high percentage of individuals of Hispanic and Mexican descent, already has disproportionately high pollution exposures, is dense with polluting facilities and has the highest cancer mortality in the state**

A look at the *Southeast New Mexico Threats Map* shows a multitude of polluting facilities, including oil and gas development and many radioactive and hazardous sites in southeast and parts of south central New Mexico. A close-up view would show even more. The area is heavily polluted. Soil is contaminated with radioactive particles released from the WIPP explosion and the Trinity atomic bomb test and is polluted from petroleum spills and its own naturally high level of arsenic. Air is polluted from oil refineries and methane from the enormous oil and gas industry development and from the radioactive and hazardous particles that are continually suspended and re-suspended by the high winds and frequent tornados in the area. Even many of the rivers are contaminated along with some of the groundwater that is polluted with superfund plumes, fracking chemicals, PFAS and other pollutants.<sup>121</sup>

The cancer mortality rate in southeast New Mexico is the highest in the state and life expectancies are low. This cancer mortality rate exists *only* in this area

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<sup>120</sup> WIPP Volume Mod transcript, 40-41, October 25, 2018 (Exhibit 13)

<sup>121</sup> *Southeast New Mexico Threats Map*, Ex. 6, 7c : Design, LLC, 2019 (Exhibit 35)



of the state—no where else.<sup>122</sup> Yet NMED continues to permit and to renew permits for un-built facilities in this area while allowing groundwater sometimes to go unprotected as it is with the WCS discharge permit. (No other New Mexico groundwater permit for an "important" facility allows for no monitoring, sampling, and analysis *at all* that can trigger a cleanup action.) No attention is paid to the disparate impacts that exist in this highly polluted part of the state that has poor access to health care, low life expectancies, and large numbers of Hispanic and Mexican residents. As seen above, NMED is not seeking to do even legally required effects studies, let alone disparate impact studies. Other government and private entities are also trying to bring every spent fuel rod in the country to shallow storage (and maybe permanent disposal) in this same area. There is a large social concern among minority communities in southeastern New Mexico that the area already has a reputation as a "national sacrifice area" and a "radioactive corridor."<sup>123</sup>

NMED is supposed to understand and address community concerns but they have never acknowledged the health and social concerns minority communities have with all of these facilities and wells—some of them intertwined into residential areas, as in Eunice.<sup>124</sup> Despite comments, maps and statistics that have been given to them, NMED seems oblivious to the poor health and the massive death rate in the area. The social concern that the southeastern New Mexico is becoming seen as only useful as a garbage dump is also never acknowledged as NMED continues to claim that minority community social concerns need not be considered as part of the permitting process. Yet this and health concerns are central concerns for many affected LEP and minority individuals in the area. Environmental and health impacts are already significant but NMED has never discussed them nor considered bringing facility density and public health criteria into their siting and permitting analyses for the area. Nor are they trying to avoid net increases of pollution in these communities. Until NMED does this, the poor health, short life expectancies and high death rate in this area will only continue or increase. Not looking to see if there are disparate effects doesn't mean they aren't there. Many poor health outcomes described above are linked to being Hispanic and/or having low English proficiency. Much of the disparate effect on these communities is occurring because of NMED's policies. Because NMED has not looked at the history, background, needs and concerns of LEP and minority communities in southeastern New Mexico, these policies have resulted in death

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<sup>122</sup> *Id.*

<sup>123</sup> CIS Development Project: Eddy-Lea Energy Alliance LLC, *Holtec & ELEA, LLC's Vision for a Centralized Interim Storage Facility*, 5 (May 11, 2017)(provided in a file as "Exhibit 46")

<sup>124</sup> Satellite map of the Eunice, New Mexico Community Center and nearby blocks showing pumpjacks, (the WCS DP-1817 hearing was held at the Community Center) Google Maps, May, 2018 (provided in a file as "Exhibit 47;" Satellite map of the Eunice, New Mexico High School and nearby blocks showing pumpjacks, Google Maps, May, 2018 (provided in a file as "Exhibit 48")



and discrimination for the high concentration of residents of Hispanic and Mexican descent in this area.

#### **IV. SUMMARY AND CONCLUSION**

##### **A. NMED's DP-1817 Permitting Process Violated Title VI**

NMED's process of permitting the WCS facility discharge amounted to disparate treatment of LEP New Mexicans by not providing them equal access to NMED's protections, programs and activities compared to that provided English speakers. This had a disparate effect on LEP individuals in that they were prevented from participating fully and equally in the public process for this discharge permit.

Vital documents were never defined, documents were translated late and/or not noticed, translated documents were not provided to the local information repository, and public notices and the summary of the permit were created and translated with multiple omissions and mistakes. Thus, not only was the quantity of the information available to LEP persons throughout the permitting process dramatically less than what English speakers could access, but the quality of that information was diminished as well. Though English speakers could read the actual draft permits and other documents in the Record and regulations to correct these deficiencies, for the most part LEP Spanish speakers could not. An important issue for DP-1817 was that the final Draft 3 Permit was far less protective than the Draft 2 Permit had been. But LEP persons were never able to read Draft 2 or any of the public notices about it and had available only a misrepresentation of Draft 3. It was impossible for them to compare the two drafts. Vital information that was readily available to the public in English was not available in any way to the LEP public.

NMED also never let the community know that a Spanish interpreter was available to help with Spanish language access outside of the hearing itself, their phone system was English-only, and their website had minimal information in Spanish. Thus, it was impossible for LEP New Mexicans to inform themselves adequately about the WCS facility, discharge, permit or the geology and hydrology of the discharge area. Without such information, they could not participate in any meaningful way in the public process for DP-1817.

In addition to translation problems, NMED never inquired about the history, background, concerns or needs of the LEP and minority affected communities—even though their concerns were many—and thus had no plan to address those concerns or incorporate this information into the permitting process. No PIP was even created. Somehow, without involving the community, NMED believed they did understand community concerns, but they did not. (For instance, despite comments on the subject, NMED appeared surprised when they were told that a significant number of CARD, AFES and CCNS members didn't want *any* New Mexico discharge permit but wanted WCS to re-route its discharge back into Texas instead.)



All of this created a perfect storm of disparate treatment that had a disparate effect on the ability of LEP and individuals of Hispanic or Mexican descent to make their needs and concerns known and to participate fully and equally in the permitting process for DP-1817.

**B. NMED continues to have a statewide pattern and practice of discriminatory permitting and lack of access for LEP residents to the public participation and permitting process for all of NMED's permit**

The problems described for the DP-1817 public process are repeated throughout the public processes for virtually all of NMED's permits. NMED continues to avoid LEP and minority community involvement on every level—Policies, PIPs, input and review. No matter how often NMED is provided comments or letters asking for such involvement and pointing out federal guidance that describes involvement by these communities as a cornerstone of non-discrimination, it continues to keep LEP and minority communities at arms length. Thus, NMED has ended up with a system that continues to discriminate.

Many of the provisions in the three Policies, that are supposed to make NMED's programs and actions more inclusive, actually amount to disparate treatment and even have a chilling effect on public participation by LEP and minority individuals. Determining language assistance and budgeting needs locally instead of programmatically, for instance, leaves out interested and potentially affected LEP and minority individuals throughout the state and limits the amount of language assistance and outreach provided locally as well. PIPs that say NMED "... *will strive to make public participation efforts as inclusive as possible within the Bureau's budget and time limitation*" [emphasis added],<sup>125</sup> do not bode well for ending disparate treatment of LEP individuals or increasing their participation in the public process. Basing the level of services to communities on their level of past involvement also will only increase disparate treatment and discourage participation. Keeping the determination of services at the programmatic level helps to build up and encourage public participation by LEP community members—something NMED desperately needs to do.

Throughout its programs and actions, NMED continues to obstruct public participation by LEP persons by severely limiting their access to vital information that is readily available to English speakers—even for "important" facilities. NMED and its bureaus refuse to define and translate virtually any vital documents or to provide regular notice of the availability of translated information, making this information inaccessible to LEP persons. Throughout all of NMED's permitting processes, no permit has ever been defined as "vital" and only one primary document out of all permits' Administrative Records has been translated—the WCS Record Index. Despite well-intentioned statements in some PIPs that public notices will include information about the availability of an in-house translator/interpreter, this

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<sup>125</sup> NMED, Public Involvement Plan (PIP) for URENCO USA (DP-1481) 5, February 22, 2019 (Exhibit 41)



information is still not being included. NMED's phone system still has no Spanish option and the amount of information available to the Spanish-speaking public is still far less than that available to English speakers.

NMED and its bureaus also continue not to investigate the history, background, needs or concerns of minority communities potentially affected by NMED's permitting decisions and are not creating plans or taking steps to address those needs and concerns. Again, NMED avoids contact with the LEP and minority public and instead turns to limited tools like EJSCREEN to try to find answers. The Department appears unaware that there is a large interest in many of NMED's "important" permitted facilities among the minority and LEP public throughout the state and that many of these individuals could be disparately impacted by facility transportation from a facility even though that facility is not just next door. NMED seems to have forgotten that there can be significant effects "downstream" and "downwind" from a facility beyond the four mile radius around a facility that it thinks should be the boundary containing any affected communities. These misunderstandings have led to NMED's decision to analyze translation, budget and other needs locally instead of programmatically or state-wide, leaving the concerns of large numbers of LEP and minority New Mexicans out of the permitting process completely. This disparate treatment is compounded by NMED's seeming unawareness that some areas of New Mexico, that have high concentrations of minority residents, are overburdened with polluting facilities and already have severe public health problems. Yet, in order to avoid creating disparate impacts on minority communities in New Mexico and to meet their Title VI obligations, it is critical that NMED and its bureaus understand the history, background, needs and concerns of the LEP and minority communities into which they are siting polluting facilities, and that they understand the effects that NMED's policies and decisions are having on these communities.

The news is not all bad. NMED has made some progress since 2002. Most or all public notices are translated at least into Spanish. Some are translated into other Native languages as well, particularly in the Solid Waste Bureau.<sup>126</sup> NMED does provide a small amount of information in Spanish on their website as well as reading assistance for visually disabled people. Public notices also usually include information on assistance for the disabled, sometimes provide information on how to request language assistance, and NMED sometimes provides "enhanced" notification that is beyond the minimum required in the regulations.

Yet the big issues—involving the LEP and minority communities in creating a culture of non-discrimination at NMED, providing access for them to the same vital information regarding permits and permitting that is readily available to English speakers, incorporating the communities' needs and concerns into the permitting process, and proactively partnering with communities and a variety of community stakeholders to increase public participation by LEP and minority community members—have improved little or not at all. The 2002 Title

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<sup>126</sup> New Mexico Environment Department, Solid Waste Bureau, PIP for the Lea County Landfill, June 5, 2018 (Exhibit 42)



VI complaint listed the same or similar problems that are listed in this complaint 17 years later: that the LEP public was obstructed from participating in the public participation process for the facility, was denied access to vital documents, and that NMED refused to consider social and discrimination concerns in its permitting process. The older complaint also alleged that NMED had a statewide pattern and practice of similar discriminatory permitting and lack of access for LEP individuals. All of these problems continue today. The result of these major deficiencies in NMED's public process is that LEP persons and persons of Hispanic or Mexican descent still have no real meaningful access to the public participation process for any NMED permits

Despite a Resolution Agreement in place, NMED's cumulative decisions have undermined the public permitting process for all their permits to such an extent that their actions and policies amount to disparate treatment and have had a disparate effect on the LEP public in New Mexico by preventing them from having meaningful involvement in the permitting process and some influence on the decisions about just how much contamination they should be subjected to. NMED's decisions and policies also continue to have a disparate effect on minority communities throughout the state by not addressing their needs and concerns and not incorporating those concerns into the permitting process. NMED has an affirmative responsibility not to discriminate. By not honoring the Resolution Agreement through its statewide policies, by diverging radically from federal guidance on public participation and by not providing equal access to its programs and activities, NMED continues to have a pattern and practice of discrimination against LEP and minority New Mexicans because of their race, color or national origin.<sup>127</sup>

## **V. PRAYER FOR RELIEF**

Complainants believe that NMED needs further supervision by and more help from EPA to bring their programs and actions into compliance with Title VI and federal guidance. NMED does not yet have a culture of non-discrimination and needs close, effective and vigorous monitoring to ensure that the commitments it made in the Resolution Agreement are implemented. Increasing involvement by the LEP and the minority public in the permitting process after they have been prevented from participating for so long is, admittedly, not easy and EPA could be invaluable in providing guidance and help to NMED in that area as well.

### **Complainants' requests for improvements fall into four main categories, that NMED:**

1. Proactively involve LEP and minority communities in creating a culture of non-discrimination at NMED
2. Provide access to the same vital information for LEP individuals that is readily available to English speakers
3. Consider and incorporate LEP and minority community background, history, needs and concerns in the permitting process

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<sup>127</sup> 40 C.F.R. §7.35



4. Proactively partner with LEP and minority communities and a variety of such community stakeholders to increase public participation by these community members

**Actions in support of each category include:**

1. Proactively involve LEP and minority communities in creating a culture of non-discrimination at NMED
  - a. Incorporate public involvement by LEP and minority communities into revising the three Policies in order to bring them into conformance with federal guidance.
  - b. Incorporate public involvement by LEP and minority communities into creating Public Involvement Plans that are in conformance with federal guidance.
  - c. Incorporate public involvement by LEP and minority communities into revising the curriculum for employee training and extend that training to include contractors.
  - d. Create a short, formal review and appeal process for the three Policies
  - e. Create a short, formal and timely review and appeal process for PIPs
2. Provide access to the same vital information for LEP individuals that is readily available to English speakers, particularly for "important" permits
  - a. If a need for language assistance has been identified, define and identify "vital" documents; then translate, or summarize and translate, those documents.
  - b. Identify needed language services and budget for those services on a programmatic level as well as on a local level.
  - c. Include the availability of language services, translated documents, and disability services in all public notices
  - d. Create a short, formal, and timely review process for NMED's decisions about permit "importance," the need for translation, and the definitions of "vital" documents
  - e. Create a short, formal, and timely review and appeal process for the content of summaries of vital documents, the content of fact sheets, and the accuracy of translations.
  - f. Continue to increase and improve Spanish content and disability options on the website so that all members of the public have access to the same important information that is readily available to English speakers
  - g. Include a Spanish option on the phone system
3. Consider and incorporate LEP and minority community background, history, needs and concerns in the permitting process
  - a. In consultation with a variety of LEP and minority community stakeholders, include community history, background, needs and concerns—beyond language access and public participation—in each PIP.
  - b. Incorporate permitted and unpermitted facility and discharge density, public health, and social concerns into siting and permitting analyses with the goal to avoid net increases of pollution in minority communities that have disproportionately high exposures or that already host a number of facilities.
  - c. Make sure that the requirements of 40 C.F.R. §270.10(j) for exposure studies are met for *all* hazardous waste facility permit applications and that any previous studies are brought up to date for permit modifications or renewals.



- d. Extend exposure studies performed under Section (j) to see if exposures from the facility or facility transportation could cause disparate impacts on affected minority communities.
  - e. Contract for a comprehensive public health study to understand why the cancer mortality rate in southeastern New Mexico, an area with high numbers of individuals of Hispanic or Mexican descent, is the highest of anywhere in the state and why life expectancy is so low. While there are high levels of pollution and a density of facilities in the area, it appears that other social factors, including factors related to LEP or minority membership, are also involved.
4. Proactively partner with LEP and minority communities and a variety of such community stakeholders to increase public participation by these community members
- a. Consult with stakeholders and such communities directly to understand what methods would work best to engage community members
  - b. Offer more services, not less, to LEP and minority affected or potentially affected communities that have had low historical participation, especially if the permit involves an "important" facility
  - c. Contract for a "marketing" study to improve on NMED's efforts to inform and engage the LEP and minority public and to increase their participation in NMED's programs and activities. Legally required public outreach like public notices has not been effective. Even enhanced publication of notices, fact sheets and radio spots has been ineffective in engaging the LEP and minority public. NMED must be pro-active in engaging these communities, but must first understand the best ways to encourage their participation.

## VI. NOTE

Complainants would be open to any reasonable request from EPA to extend the amount of time to investigate this complaint beyond 180 days, particularly if that request involves asking Complainants for additional information.

Complainants actually have always hoped to work *with* NMED to improve public participation and access for all New Mexicans and to protect and improve our environment and public health. Too often both sides are instead in an adversarial relationship. However, it is difficult to work with NMED when they keep the public and especially the LEP and minority public, at arms length. However, we are hoping to meet soon with NMED to discuss problems and solutions both for LEP and minority communities and for public participation in general. If these discussions are productive and enough of the areas of concern described above are addressed in a meaningful way, Complainants would like nothing better than to withdraw this complaint at that time.

Respectfully Submitted by:

Ex. 6, 7c

Ex. 6, 7c

for Citizens for Alternatives to Radioactive Dumping (CARD)

6-3-19

Date

Approved for signature by Ex. 6, 7c telephonically on May 31, 2019 /s/ Ex. 6, 7c  
Ex. 6, 7c for Concerned Citizens for Nuclear Safety (CCNS)

Approved for signature by Ex. 6, 7c telephonically on May 31, 2019 /s/ Ex. 6, 7c  
Ex. 6, 7c individually and for the Alliance for Environmental Strategies (AFES)

Approved for signature by Ex. 6, 7c telephonically on June 2, 2019 /s/ Ex. 6, 7c  
Ex. 6, 7c individually



**Attachment A:** Contact Information for Complainants

Ex. 6, 7c  
CARD

117 Duran Street

Santa Fe NM 87501-1817

505-986<sup>Ex. 6, 7c</sup> (voice and fax)

<sup>Ex. 6, 7c</sup>@nets.com

Ex. 6, 7c  
CCNS

P.O. Box 31147

Santa Fe NM 87594

505-986-<sup>Ex. 6, 7c</sup>

<sup>Ex. 6, 7c</sup>@nuclearactive.org

Ex. 6, 7c

Ex. 6, 7c

**Attachment B: Exhibits**

**Exhibit 1:** Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, Jan. 19, 2017 (EPA File No. 09R-02-R6)

**Exhibit 2:** Findings of Fact and Conclusions of Law submitted by CARD and AFES in the matter of the Application of WCS for a Groundwater Discharge Permit, GWB-18-11(P), October 19, 2018

**Exhibit 3:** New Mexico Environment Department, Public Participation Policy 07-13, February 6, 2018, <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-13.pdf>

**Exhibit 4:** Public Involvement Plan, Waste Isolation Pilot Plant (WIPP) Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July 2018, (EPA ID#: NM4890139088)

**Exhibit 5:** Affidavit of Deborah Reade in the Matter of the Application of Waste Control Specialists LLC for a Groundwater Discharge Permit (DP-1817) for the Waste Control Specialists LLC Facility, GWB-18-11(P), September 17, 2018

**Exhibit 6:** Contents of NMED binder for English and Spanish DP-1817 documents, located at the Eunice Public Library (photos taken by Deborah Reade on October 4, 2018 after the last day of the hearing)

**Exhibit 7:** New Mexico Environment Department's Response to CARD's and AFES' Opposed Motion, in the Matter of the Application of Waste Control Specialists LLC Discharge Permit (DP-1817) [No. GWB-18-11(P)] for continuance of the September 21, 2018 Deadline and of the October 2, 2018 Public Hearing, September 28, 2018

**Exhibit 8:** Ground Water Quality Bureau, Notice of Public Hearing, Waste Control Specialists, LLC (DP-1817) Fact Sheet Available, issued by email 7-9-2018 (not entered into the Administrative Record)

**Exhibit 9:** In re Application of Rhino Env'tl. Services, 2005-NMSC-024, ¶¶ 22-24, 138 N.M. 133, 139-40, 117 P.3d 939, 945-46

**Exhibit 10:** U. S. Environmental Protection Agency EJSCREEN Fact Sheet (August 14, 2018) [https://www.epa.gov/sites/production/files/2018-08/documents/2018\\_ejscreen\\_fact\\_sheet\\_8-14-18.pdf](https://www.epa.gov/sites/production/files/2018-08/documents/2018_ejscreen_fact_sheet_8-14-18.pdf)

**Exhibit 11:** New Mexico Environment Department, Limited English Proficiency ("LEP") Accessibility and Outreach Policy 07-11, February 6, 2018, <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-11.pdf>

**Exhibit 12:** Transcript of the Proceedings, In the Matter of Los Alamos National Laboratory's Groundwater Discharge Permit, DP-1793, November 8, 2018, Volume 2, 234-341 (Cross-Examination by Joni Arends of NMED witness Stephen Pullen)



**Exhibit 13:** Transcript of the Proceedings, In the Matter of the Waste Isolation Pilot Plant's Hazardous Waste Facility Permit, October 25, 2018, (EPA ID NO. NM4890139088)(Cross-Examination by Joni Arends of NMED witness Paul Maestas)

**Exhibit 14:** Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, October 2, 2015 (1st Draft Permit)

**Exhibit 15:** Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, March 3, 2017 (2nd Draft Permit)

**Exhibit 16:** Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, Jun. 9, 2017, (3rd and final Draft Permit) [http://nuclearactive.org/wp-content/uploads/2017/08/d\\_WCS\\_GWDP\\_1817\\_060917.pdf](http://nuclearactive.org/wp-content/uploads/2017/08/d_WCS_GWDP_1817_060917.pdf)

**Exhibit 17:** Letter from Andrea Kock, Deputy Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission to Rod Baltzer, President and CEO, Waste Control Specialists LLC, January 18, 2017

**Exhibit 18:** Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. (Jun. 25, 2004) (EPA LEP Guidance) <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf>

**Exhibit 19:** Title VI Public Involvement Guidance for Environmental Protection Agency Assistance Recipients Administering Environmental Permitting Programs, 71 Fed. Reg. (Mar. 21, 2006) (EPA Public Participation Guidance) [https://www.epa.gov/sites/production/files/2013-09/documents/title6\\_public\\_involvement\\_guidance.3.13.13.pdf](https://www.epa.gov/sites/production/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf)

**Exhibit 20:** Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, Re: NMED Limited English Proficiency & Public Participation Policies Following the Resolution Agreement in EPA Case No. 09R-02-R6, March 12, 2018

**Exhibit 21:** Email from Lara Katz, NMED to Deborah Reade, June 4, 2018

**Exhibit 22:** New Mexico Environment Department, Disability Accessibility and Outreach policy 07-10 (February 6, 2018), <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-10.pdf>

**Exhibit 23:** New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) August 2, 2018 (2nd hearing fact sheet-English)

**Exhibit 24:** New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) August 2, 2018 (2nd hearing fact sheet-Spanish)

**Exhibit 25:** New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) June 5, 2018 (1st hearing fact sheet-English)

**Exhibit 26:** New Mexico Environment Department's Statement of Intent to Present Technical Testimony, in the Matter of Waste Control Specialists LLC (DP-1817)[GWB 18-11 (P)]  
Technical Testimony of Stephen Pullen, September 21, 2018

**Exhibit 27:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017, Administrative Record 02024 to 02027 (English)

**Exhibit 28:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017 (Spanish)

**Exhibit 29:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, November 17, 2017, Administrative Record 02322 to 02323 (English)

**Exhibit 30:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, November 17, 2017 (Spanish)

**Exhibit 31:** New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, June 5, 2018, Administrative Record 02407 to 02413 (first hearing notice-English)

**Exhibit 32:** New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, June 5, 2018 (first hearing notice-Spanish)

**Exhibit 33:** New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, August 2, 2018 (second hearing notice-English)

**Exhibit 34:** New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, August 2, 2018 (second hearing notice-Spanish)

**Exhibit 35:** Southeast New Mexico Threats Map, Deborah Reade Design, LLC, 2019

**Exhibit 36:** Satellite map of Eunice, New Mexico and the surrounding area, Google Maps, 2018

**Exhibit 37:** Comments on the June 2018 Fact Sheet & Suggestions for Translation and Information Inclusion in the Permit Summary Fact Sheet, July 17, 2018

**Exhibit 38:** Email from Deborah Reade to Lara Katz, NMED, Re-Comments and Suggestions for Information Inclusion in the New Fact Sheet, July 17, 2018

**Exhibit 39:** Letter from the UNM School of Law Natural Resources and Environmental Law Clinic and 21 groups to Jennifer Hower, General Counsel, New Mexico Environment Department, Re: Second Request for Community Input on NMED's Public Participation and Limited English Proficiency Policies, December 17, 2018

**Exhibit 40:** New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for Special Waste Disposal, Inc. (DP-1012) November 13, 2018, [https://cloud.env.nm.gov/water/resources/\\_translator.php/sv5kXkHMN0qJjuZvBPd+Pjq3arcmv](https://cloud.env.nm.gov/water/resources/_translator.php/sv5kXkHMN0qJjuZvBPd+Pjq3arcmv)



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**Exhibit 41:** New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for URENCO USA (DP-1481) February 22, 2019, [https://cloud.env.nm.gov/water/resources/\\_translator.php/7IFzxz/tEqyLuZE/AuGSiIz7T1GuJdor zUbzSVQGgzPcDtLgBBGRzghnxhOgXMH6U4KGqgMcb9FXUh8wDimK7gDgtal1PR8Hj7lx Edg6iCI=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/7IFzxz/tEqyLuZE/AuGSiIz7T1GuJdor zUbzSVQGgzPcDtLgBBGRzghnxhOgXMH6U4KGqgMcb9FXUh8wDimK7gDgtal1PR8Hj7lx Edg6iCI=.pdf)

**Exhibit 42:** New Mexico Environment Department, Solid Waste Bureau, Public Involvement Plan (PIP) for the Lea County Landfill, June 5, 2018, [https://www.env.nm.gov/wp-content/uploads/2018/04/SWB\\_PIP-6-miles-LCLF-June-12-2018-FINAL.pdf](https://www.env.nm.gov/wp-content/uploads/2018/04/SWB_PIP-6-miles-LCLF-June-12-2018-FINAL.pdf)

**Exhibit 43:** New Mexico Environment Department, Hazardous Waste Bureau, Public Involvement Plan (PIP) for the WIPP Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July, 2018, <https://www.env.nm.gov/wp-content/uploads/2016/05/FINAL-PIP-WIPP-Class-3-VOR-7-26-2018.pdf>

**Exhibit 44:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, [https://cloud.env.nm.gov/water/resources/\\_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSuc5+qFQDhUkAiQiAs/jST8KxTkj1BfdAQV7Ju0LwCIQfSa662EYK5/JUU0XMnfly0=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSuc5+qFQDhUkAiQiAs/jST8KxTkj1BfdAQV7Ju0LwCIQfSa662EYK5/JUU0XMnfly0=.pdf) (English)

**Exhibit 45:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, [https://cloud.env.nm.gov/water/resources/\\_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSt2yW+oyABm9ZpdXuwmihnWG/G9XWEVlll5Urd3OtPXrBFMMZ504VjJdwLG1s0pLiQ=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSt2yW+oyABm9ZpdXuwmihnWG/G9XWEVlll5Urd3OtPXrBFMMZ504VjJdwLG1s0pLiQ=.pdf) (Spanish)

**Exhibit 46:** CIS Development Project: Eddy-Lea Energy Alliance LLC, Holtec & ELEA, LLC's Vision for a Centralized Interim Storage Facility, (May 11, 2017)

**Exhibit 47:** Satellite map of Eunice, New Mexico community center and nearby blocks showing pumpjacks, Google Maps, May, 2018

**Exhibit 48:** Satellite map of Eunice, New Mexico High School and nearby blocks showing pumpjacks, Google Maps, May, 2018

**Exhibit 49:** New Mexico Department of Health, State Center for Health Statistics, Bureau of Vital Records and Health Statistics, Epidemiology and Response Division, New Mexico Selected Health Statistics, Annual Report 2017, <https://nmhealth.org/data/vital>

**Exhibit 50:** Instituto Cervantes at FAS - Harvard University, Hispanic Map of the United States 2017, November 2017, [http://cervantesobservatorio.fas.harvard.edu/sites/default/files/hispanic\\_map\\_2017en.pdf](http://cervantesobservatorio.fas.harvard.edu/sites/default/files/hispanic_map_2017en.pdf)

**Exhibit 51:** New Mexico Department of Workforce Solutions, Rachel Moskowitz, Bureau Chief, Economic Research & Analysis Bureau, Poverty in New Mexico, 2019,  
[https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty\\_in\\_NM.pdf](https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty_in_NM.pdf)

**Exhibit 52:** New Mexico Department of Health, Epidemiology and Response Division, 2018  
The State of Health in New Mexico, April 2018,  
<https://ibis.health.state.nm.us/report/soh/Introduction.html>



Ex. 6, 7c

urgent letter  
very important  
6-27-19 9:36  
Refuse

I am 100% Deaf can not hear phone

Special attn:

Civil Rights Complaints

U.S. EPA External Civil Rights  
Compliance office (2310 A)

1200 Pennsylvania Ave NW  
Washington D.C. 20460  
(202) 364-096

Complaint aspects: Location

Ex. 6, 7c

Landlord: Ex. 6, 7c - Rental office

Refuse Clean Wash Replace Top Panel Roof  
He said "NO"

Pass 6 with my apartment  
Smell like Dead Bird Virus  
make me sick Headache Nausea

Bird Hi-Servant Stink Low  
Smell Dead Bird Virus

Stop Top of my Window Roof  
Bird Fly in out all day Low Stink

Roof Panel open never fix  
Landlord Fail Fix Leaks  
24 hr a/c inspection Fail

Please Send inspection to inspect

Displace Bird Flu Virus  
Stink Stink Stink

Stop this discrimination Roof  
Lock Fix Roof Clean Wash

he said "NO" "NO" "NO" "NO"  
3:30 6-5-19 Rented off



discrimination, Bigotry, Harassment

Send all information ASAP

Diseasy Dead Bird  
Fly Virus germ Disease

Reek Dead Smell Stink  
my whole apartment

Bedroom / living room / Bathroom

~~make me~~ Make me sick

What to do Bird Fly Virus  
germ disease low smell

he refuse fix repairs of low smell  
wash Clean Open Panel Filthy  
Top Roof above my window

fail 2 years ago inspectors not fix now  
Bird Fly on apt all day  
help please

(2)

Ex. 6, 7c

Proximal Homophil & CAPITAL DISTRICT 200218  
8100 Mass Ave S.S.  
3000 Webster Dr  
20020-3024  
U.S. EPA External Civil Right  
Compliance Office (23104)  
1200 Pennsylvania Ave NW  
Washington DC

19 JUN 2019 PM 11

JUL 23 2019



07/19





Ex. 6, 7c

California Medical Facility

Ex. 6, 7c

Ex. 6, 7c

CA 95096-2000

April 18, 2019

TO: Mr. Dale Rhines, Deputy Director  
U.S. EPA External Civil Rights Compliance  
Office

Re: California Medical Facility, Marston  
Toreo D. Lozano violations of  
Americans with Disabilities Act  
Qualified inmates (ADA) subjected  
to Haemolytic streptococcus Group A  
Bacteria and other infections

Dear Mr. Rhines the California Medical  
Facility (CMF) was built in the early 1960's  
and is old dilapidated and falling apart  
daily, especially the gym. It's ceiling has  
holes that when it rains staff has to put over  
50 buckets down to catch rain water, there's  
a strong odor of ferment eaten wood and  
dark brown stains dripping down the walls.  
I consulted officers and medical nurses  
and doctors who confirm it is "Asbestos" and  
"Black Mold". I documented the slates and  
times I saw Asbestos abatement trucks  
park long trailers next to the buildings as



workers dressed in white protection with face masks on top of the roofs tossing stuff down into those long bins.  
The buildings have built-in steam like heat radiating to keep the cells warm as they get very cold at night with maintenance shuts off the heat to do repairs which is often.

White puff is gray and I was informed by maintenance crews that it is asbestos.  
In March 15, 2018 this prison was under quarantine due to epidemic spread of "H1N1" (Moravians) in which former warden Fox issued a memorandum to this effect.

Mr. Rhines, I don't know if your familiar with CDC exposing prisoners to

"Valley Fever" See Smith, et al. v. Schwarzenegger et al. Ninth Circuit Case No. 15-17155 Eastern Dist Case No. 1:14-cv-60-LTO-SAB, etc.

CDC officials violated the Equal Protection Clause of the 14th Amendment by intentionally failing to protect African-American inmates whom the officials knew had a heightened risk of developing disseminated "valley".

I am an African American with

upper respiratory infection.

I suffered five strokes due to a drug







Ex. 6, 7c

write back legal mail to;

Summary.

Thank you again for a speedy response!

all you need there.

If anything start with the Gyn you'll have this matter and actually doing something.

Mr. Rhines, thank you for looking into

and other if you need, please help "us" sir.

of medical records, appears, letters to DOT

if it's here or a lie. I can send you copies

refuse to even investigate my claims to see

just to meet the DOT's criteria and still they

record numbers. Why? I filed a class action

and it is "NOT". Inmates are dying here, at

CNTF is suppose to be a "medical facility"

all to no avail. Can you please help us?

Civil Rights Division, Special Litigation Section

nurses fines to U.S. Department of Justice

grievances and lawsuits and complaints

Mr. Rhines, I have filed nurses

and vermin, huge cockroaches that infest buildings

there is sanitation problems, unhealthy air

guarantees everyone "equal protection of the law"

17th Amendment to the U.S. Constitution that

I alleged discrimination in violation of the



EX. 6, 7c

7 all forms necessary

EX. 6, 7c

EX. 6, 7c CA. 95696-2000

**Harrison, Brenda**

---

**From:** Ex. 6, 7c  
**Sent:** Wednesday, May 22, 2019 8:00 PM  
**To:** Title VI Complaints  
**Cc:** [daria.neal@usdoj.gov](mailto:daria.neal@usdoj.gov)  
**Subject:** Georgia Department of Natural Resources (DNR) Violation of Title VI of the Civil Rights Act of 1964  
**Attachments:** EPA Complaint.pdf; DNR Internal Investigation Document and Pelham Response.pdf

To Whom It May Concern,

Attached find an EPA Civil Rights Complaint and a copy of the DNR Internal Investigation Report with my Rebuttal Statements. Please contact me ASAP if any additional material regarding this complaint is needed. Thanks...

Dwayne

Ex. 6, 7c

Territory: Atlanta/North Georgia

Ex. 6, 7c





To: U.S. EPA External Civil Rights  
Compliance Office (2310A)  
1200 Pennsylvania Ave., NW  
Washington D.C. 20460

From: Ex. 6, 7c

Ex. 6, 7c

Date: May 22, 2019

RE: Georgia Department of Natural Resources (DNR) Violation of Title VI of the Civil Rights Act of 1964

On Jan. 30<sup>th</sup>, 2019 at approximately 4:30 pm an incident took place involving myself and armed Officers of the Georgia Department of Natural Resources (DNR) and the Georgia Bureau of Investigations (GBI). The following information contained in this correspondence is submitted to your office in support of my claim that I was racially profiled while in the performance of my duties as a Ex. 6, 7c Furthermore, it is my belief that a thorough investigation by an independent agency will show that this incident was in direct violation of Title VI of the Civil Rights Act of 1964.

In addition, Officers of the DNR used their body cams to record their interaction with me AFTER they verified that I was a Ex. 6, 7c It is my understanding that this action may have been in direct violation of the DNR, Georgia Law Enforcement, or Department of Justice policies as it pertains to the recording of other Law Enforcement Officers while they are in the performance of their official duties.

Upon arriving to the Baker Street railroad crossing, downtown Atlanta, Georgia as a credentialed member of the NFL Super Bowl LIII security team, I checked in with the S.A.F.E. (Event Management) employee at this location. Orange cones were set up at the railroad crossing to prevent vehicles from crossing over the railroad tracks and entering the secured perimeter for Super Bowl LIII. The area of this incident is located directly behind the Georgia World Congress Center adjacent to Baker Street.

The S.A.F.E. security employee approached my truck, checked my credentials, and after determining that they were valid he waved me through the cones set up at the railroad crossing at the Baker Street Super Bowl Zone Access point. However, the location where I positioned my authorized personal work vehicle Ex. 6, 7c was not actually inside the Super Bowl security perimeter. When the cones were removed I made an immediate left just before the railroad crossing, onto CSX Railroad



property that I Ex. 6, 7c  
Ex. 6, 7c

During my initial interaction with the S.A.F.E. security employee, two armed DNR Officers remained stationed at their post about 25 feet on the other side of the railroad crossing. I was later informed that the two DNR Officers at this location were Game Wardens Bobby Sanders and Joseph Cowart.

I then positioned my vehicle adjacent to the railroad tracks and made preparations to conduct my duties as a Ex. 6, 7c

Ex. 6, 7c

My intentions were to Ex. 6, 7c

Ex. 6, 7c

at this location. In addition, I also planned to Ex. 6, 7c

Ex. 6, 7c

would be operating on tracks at this location.

While putting on my safety equipment I noticed the two DNR Officers (GW Sanders and GW Cowart) looking my way while appearing to be discussing my position adjacent to the tracks. After putting on my safety equipment I conducted an Ex. 6, 7c  
Ex. 6, 7c and Ex. 6, 7c at the location. I performed these Ex. 6, 7c in full view of DNR Officers (GW Sanders and GW Cowart) who stood at their security post approximately 50 feet away. After completing Ex. 6, 7c a time span of about 15 minutes, I returned to my vehicle where I sat in the driver's position and continued to wait for the CSX trains.

Moments later the two DNR Officers (GW Sanders and GW Cowart) approached my vehicle. GW Sanders stepped to the passenger side front window of my truck while GW Cowart stood several feet behind him. GW Sanders began to apologize for the S.A.F.E. employee who initially questioned my credentials. I told him that he was just doing his job. I then briefly explained my duties with the Ex. 6, 7c However, GW Sanders then asked me if he could see the back of my NFL Super Bowl LIII credentials that were displayed around my neck. I then responded that "My credentials are the same as yours" as I flipped the credentials over to show him the back side. At no time did GW Sanders ask to physically examine my credentials nor did he express any concerns regarding fake credentials. Then GW Sanders shook my hand, apologized again for any misunderstanding, and he and GW Cowart returned to their security post about 50 feet away.

About 15 to 30 minutes later two additional DNR Officers arrived on the scene. They were later identified as the DNR on-site supervisor Sgt. Lee Brown and Corporal Eddie Tompkins. I observed both having a briefing with GW Sanders and GW Cowart. This discussion lasted for approximately 10 minutes. As I observed their interaction from inside my truck, which was parked about 50 feet away, I could clearly see that they were still debating my position adjacent to the tracks and my authority at the location.

At some point Corporal Tompkins then approached my vehicle and began questioning my credentials, authority, and reasons to be sitting at the location. I again produced my NFL



Super Bowl LIII security credentials for the third time. In addition, at this time I also displayed my Ex. 6, 7c and Ex. 6, 7c. At no time during this incident did Corporal Tompkins nor any of the other DNR Officers ask to physically examine my Super Bowl LIII security credentials due to concerns of fake credentials. They also never asked me to remove my FRA credentials from its holder for examination.

While Corporal Tompkins was leaning on and into the passenger front side window of my truck we began to have a heated debate. At some point I stated to Corporal Tompkins "I see where this is going", for which he immediately replied "Oh, let me guess, you are talking about race now", and I replied "You said it, not me." The conversation escalated as I now felt that Corporal Tompkins was harassing and intimidating me due to his continued questioning of my credentials, and reasons for being at the location. At this point my credentials had been verified three separate times during this incident. (Once by the S.A.F.E. security employee, once by GW Sanders, and once by Corporal Tompkins).

As my exchange with Corporal Tompkins became more intensified, I then politely asked him to remove himself from his position on my truck, one in which he was still leaning on and into the passenger front side window. As Corporal Tompkins backed away from my truck I definitely felt Racially Profiled, Harassed, and Intimidated. Also, I was in complete disbelief of what transpired, considering the fact that I produced several forms of Ex. 6, 7c and Super Bowl credentials. My credentials were provided to the four members of the DNR security team present during this incident.

Shortly after Corporal Tomkins was asked to step away from my vehicle five to six members of the GBI Bomb Squad, to include a bomb sniffing dog, were called to my location. After conducting their on-site investigation, the GBI determined that I was in full possession of the proper credentials. I produced my Ex. 6, 7c, and Super Bowl LIII security credentials issued by the FBI and NFL.

After the GBI Bomb Squad departed I remained at the location and walked over to talk to the four DNR Officers who remained at the security post. At some point while I was talking to DNR on-site Supervisor Sgt. Lee Brown, Corporal Tompkins interjected our conversation and stated that "Because you were rude that's why the GBI was called." This comment was made in the presence of the other three DNR Officers: GW Sanders, GW Cowart, and Sgt. Lee Brown.

Again, GW Sanders and GW Cowart were the two DNR Officers who originally approached my vehicle. Eventually, GW Cowart was the last DNR Officers on-duty after everyone else involved in this incident left the location. GW Cowart informed me at that time that he tried to tell Sgt Lee Brown and Corporal Tompkins (who arrived at the location after my credentials had already been inspected by both GW Sanders, GW Cowart, and the S.A.F.E. security employee) that his initial inspection of my credentials determined that they were valid. However, he then informed me that for some reason the other DNR Officers didn't agree with his assessment.



I later determined through my own investigation that there was a procedure in place to determine if a Super Bowl LIII security credential suspected of being fake was indeed fake. This process involved checking the "raised" bar code on the back of the issued Super Bowl LIII security credentials. If an examination of the credential determined that the bar code was not "raised" then the credentials would be considered fake. At no time did DNR Officer's Sgt. Lee Brown, Corporal Eddie Tompkins, GW Sanders or GW Cowart ever ask to physically examine my credentials.

**It is my belief that Corporal Tompkins or the DNR Officers as a group initiated the response from the GBI Bomb Squad only because of a heated conversation with an African-American, who is a Ex. 6, 7c , was dressed in plain clothing and driving an unmarked vehicle. It is my professional opinion that the call made by DNR Officers to the GBI Bomb Squad had absolutely nothing to do with my credentials, but more so was a direct result of my being an African-American. Corporal Tompkins all but admitted this fact when he stated that "The GBI was called because I was Rude". I believe this incident was one which involved 100% Racial Profiling, Harassment, and intimidation by Officers of the DNR. Furthermore, it is my belief that DNR Corporal Eddie Tompkins was the primary DNR Officer responsible for the resulting actions described within this correspondence.**

To conclude, consider this correspondence a formal complaint against the Georgia Department of Natural Resources (DNR) on the grounds of Racial Profiling, Harassment and Intimidation of a Federal Agent during the performance of his duties. Due to the maliciousness and vindictiveness of the DNR Officers involved, I'm seeking appropriate action on behalf of the U.S. EPA External Civil Rights Office.

Ex. 6, 7c

Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

January 31, 2019

O'Neal was notified by Major England that a Citizen Complaint form needed to be provided to Carmen Patriarca.

O'Neal provided the Citizen Complaint form to Patriarca at [carmen.patriarca@dot.gov](mailto:carmen.patriarca@dot.gov).

O'Neal received the following from Patriarca:

*Lieutenant O'Neal,*

*Thank you for the quick response and for sending the form. I will forward this to our Operating Practice Inspector involved in the incident yesterday. He will complete the form and return to you at his earliest convenience.*

*Best regards,*

*Mr. Carmen J. Patriarca Jr.*

*Regional Administrator*

*Federal Railroad Administration, Region 3*

February 1, 2019

O'Neal requested written statements and body camera footage from all DNR Game Wardens who contacted Pelham on the January 30, 2019.

February 2, 2019

O'Neal received an email from the complainant, Dwayne Pelham. The email contained the Citizen Complaint form attached and the following:

*Lieutenant O'Neal,*

*Attached you should find my citizen complaint form regarding the actions of DNR Officers on January 30, 2019. I look forward to your review and response.*

*Respectfully,*

*DWAYNE PELHAM*

*Operating Practices Inspector*

*Federal Railroad Administration, Region 3*

*Atlanta/North Georgia*

*404-293-3278 (Cell)*



Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

February 3, 2019

O'Neal reviewed the Citizen Complaint form and WORD document received from Pelham. In the complaint, Pelham accused Cpl. Eddie Tompkins of racial profiling, discrimination, retaliation, intimidation, maliciousness and vindictiveness. To resolve the complaint, Pelham requested that Tompkins be terminated.

February 5, 2019

O'Neal received and reviewed written statements and body camera footage from the 4 Game Wardens; Sgt. Lee Brown, Cpl. Eddie Tompkins, GW Bobby Sanders and GW Joseph Cowart.

The statement provided by GW Sanders described Pelham as rude, very suspicious, extremely annoyed, uncooperative and evasive.

The statement provided by GW Cowart described Pelham as loud, aggravated and argumentative. Pelham told officers that the only person he answered to was the President of the United States, that he had the same authority as anyone with a weapon and that someone was going to pay for what happened to him [being screened by LE personnel]. Further, Pelham said he knew he looked suspicious and that LE personnel approaching and checking him out was what they were supposed to do. Pelham told LE personnel that his vehicle was an undercover vehicle. Personnel on scene ran the tag on the vehicle during the encounter and it returned to Pelham, it was his personal vehicle. Pelham said he had no ill feelings towards any of the Game Wardens. Pelham told Tompkins that he was already upset about [his interaction with] the GBI when he showed up and apologized for delivering Tompkins the "brunt of it".

The statement provided by Tompkins described Pelham's conversation as rude and aggressive. Tompkins said that Pelham's actions were suspicious and that he was met with a confrontational demeanor when he tried to discuss the matter with Pelham. Pelham told Tompkins, "We both know what this is really about, and this is what's wrong with the world today". Pelham later conceded he was insinuating the security check was racially motivated. Prior to the departure of the Game Wardens on scene, Pelham shook everyone's hand and said, "I have no ill feelings toward any of you".

On the body camera footage recorded during the encounter, the exchange between Tompkins and Pelham is not extraordinary.

Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

February 15, 2019

O'Neal spoke with Pelham over the telephone. The conversation was recorded by O'Neal.

O'Neal asked Pelham the following questions:

Q) 03:35 Were there any racial slurs used by our officers?

A) No

Q) 04:16 In what way did Cpl. Tompkins intimidate you?

A) He initiated the response of the GBI bomb squad

Q) 31:20 Was there any abusive language on the part of our officer?

A) He used no abusive language whatsoever

Q) 33:08 How did he [Cpl. Tompkins] show a desire to harm [malicious]?

A) At no point was I harmed. The actions that took place after I asked him to walk away from my vehicle, 5-10 minutes later, there was 5-6 bomb members of the GBI called to a federal agent's vehicle.

Q) 45:40 At any time was Cpl. Tompkins unfriendly or unprofessional?

A) You could call us both unprofessional, there was no name calling or cursing

Q) 46:40 In what way did he seek revenge [vindictive]?

A) The reactions and the results of the GBI being called were due to the vindictiveness, intimidation tactics, harassment tactics, racial profiling aspect of it, what other conclusion can we come to?

Q) 52:15 What did you mean in your statement when you clarified in the last sentence that you were not detained by DNR or the GBI?

A) Me and my organization and I wanted to make sure that this [encounter] was done for no reason, nothing was done to me.

24:14 When describing his encounter with Tompkins, Pelham said, "I'm going to let you know, at this point, the niceness was over. I've already got my mind made up, if this guy (Tompkins) walks over and asks me for my credentials, a third time after they have already been checked twice, then if he expects me to be nice, he can forget about that".



Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

February 19, 2019

O'Neal interviewed GW Joseph Cowart by telephone.

Q) Did you tell Pelham that you tried to tell Sgt. Brown and Cpl. Tompkins that his credentials were valid?

A) Not sure. I told the SAFE security that.

Q) Did you tell Sgt. Brown that Pelham's credentials were valid ("good to go")?

A) Yes

Q) Did you tell Cpl. Tompkins that Pelham's credentials were valid ("good to go")?

A) They were standing together when I told them

Q) Did you call for the GBI ID/Strike team?

A) No, not personally

Q) Were you directed to call for the GBI ID/Strike team?

A) No, I got the tag [number]

Q) Did you hear Tompkins tell Pelham that the only reason the GBI was called was because he was rude?

A) I don't remember hearing that. He did say he was acting rude.

Q) Were you briefed on counterfeit credentials?

A) Yes

Q) When were you briefed on counterfeit credentials?

A) Two days into the detail

Q) How many credentials did you check while on the SB detail?

A) 0

Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

February 19, 2019

O'Neal interviewed GW Bobby Sanders by telephone.

Q) Why did you ask Pelham about the backside of his credentials?

A) Because of the raised barcode

Q) Were you briefed on counterfeit credentials?

A) Not officially

Q) When were you briefed on counterfeit credentials?

A) On the morning of January 30

Q) When did you learn that checking the backside of the credentials was important?

A) On the morning of January 30

Q) Why did you communicate the encounter with Pelham to Cpl. Hendrix?

A) I didn't believe Pelham, it was just weird, I think I tried to call Sgt. Brown

Q) Did you communicate the encounter with Pelham with anyone besides Cpl. Hendrix?

A) Possibly, I can't remember

Q) Did you tell Sgt. Brown that Pelham's credentials were valid ("good to go")?

A) I do not remember

Q) Did you tell Cpl. Tompkins that Pelham's credentials were valid ("good to go")?

A) I do not remember telling him anything

Q) Did you hear Tompkins tell Pelham that the only reason the GBI was called was because he was rude?

A) No. I did not hear that

Q) How many credentials did you check while on the SB detail?

A) 0. At my assignment, there were none to check



Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

February 20, 2019

O'Neal interviewed Sgt. Lee Brown by telephone.

Q) Why did you respond to the scene of the Pelham encounter?

A) I was the supervisor. There was a report of a suspicious vehicle

Q) Did Cowart tell you Pelham's credentials were valid ("good to go")?

A) He said they were the same as what we had

Q) Did Sanders tell you Pelham's credentials were valid ("good to go")?

A) He may have

Q) Did you direct Tompkins to approach Pelham's vehicle?

A) I did

Q) Why did you direct Tompkins to "go talk with the driver"?

A) To check why he was there

Q) Did you call the GBI ID team?

A) I had Joseph call Command

Q) Did you direct anyone to call the GBI ID team?

A) Joseph. I directed Joseph to get the tag, I ran the tag through Command

Q) Why was the GBI ID team called?

A) Because of where the truck was parked. Where it was sitting, how it was sitting. It was a private vehicle, not a government vehicle. It had a Falcons decal on the door. For these reasons, I made the decision to call the ID team before Tompkins contacted Pelham. Tompkins was either approaching Pelham's vehicle or had just began talking to Pelham.

Q) Did you hear Tompkins tell Pelham that the only reason the GBI was called was because he was rude?

A) I don't remember that

Q) What were the duties of DNR Game Wardens at the Superbowl detail?

A) To provide high visibility presence, support SAFE with LE actions and restrict access

Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

Q) How many credentials did you check while on the SB detail?

A) 0

February 21, 2019

Brown provided O'Neal with the Super Bowl Situational Report (SitRep) for January 30, 2019, SitRep-10. SitRep-10 contains an intelligence report on the use of Fraudulent Credentials. The report warns security personnel to continue to remain vigilant to identify false credentials.

February 22, 2019

O'Neal interviewed Cpl. Eddie Tompkins at LED HQ. Prior to the interview, O'Neal read, and Tompkins signed the Garrity warning.

Q) Did you record all your enforcement activities with D Pelham?

A) I didn't have any enforcement activities with him, I was just asked to speak with him at first. Cowart was behind me recording.

Q) Why not?

A) I was just asked to tell him that an ID team was coming.

Q) How long did the unrecorded encounter last?

A) 2-4 minutes

Q) Why did you respond to the scene where Pelham was?

A) I was with Sgt. Brown.

Q) Why did you approach Pelham as he sat in his vehicle?

A) To tell him that an ID team was coming to talk to him.

Q) Why did you ask Pelham if he was insinuating that your presence had to do with his race?

A) Because he made the statement that "this is what is wrong with the world today". I've heard that before several times. I took it to mean he was insinuating that the only reason we were encountering him was that he was black.



Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

Q) Did Pelham provide his Super Bowl credentials and his agency credentials to you when you approached his vehicle?

A) He did voluntarily, I never asked for them.

Q) Why was the GBI ID team called to the scene of the Pelham encounter?

A) I did not make that call, I can only assume that it was because of where his vehicle was. His vehicle was beyond the cones where the security guards were stopping vehicles.

Q) Did you call the GBI ID team to your location to screen Pelham?

A) No

Q) Did Sgt. Brown call the GBI ID team to the location?

A) Yes Sir

Q) Did you tell Pelham that the GBI was called because he was rude?

A) No

Q) Did Cowart tell you Pelham's credentials were valid ("good to go")?

A) Somebody told me that he had a credential. I don't remember if it was Joseph or Bobby.

Q) Did Sanders tell you Pelham's credentials were valid ("good to go")?

A) One of them told me that he had a credential. I remember if they said it was valid.

Q) Were you briefed on counterfeit credentials?

A) Yes, at different meetings

Q) When did that briefing take place?

A) At every meeting. As far as the raised bar code, at the last pre-event meeting. (January 23<sup>th</sup>)

Q) How many credentials did you check while on the SB detail?

A) Less than 5

Q) Tell me in your words what was unique or extraordinary about the vehicle?

A) What made it stand out was there no government markings, there was a sticker or magnet on the passenger door, it had a personal tag, he said it was an "undercover" vehicle but when

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you ran the tag, it came back to him so it was his personal vehicle, there were very few personal vehicles [at the detail], almost all were government vehicles

Q) You describe in your statement, "rude and aggressive talk" by Pelham. Can you expound on that?

A) He was very aggressive, he kept cutting me off, I couldn't talk, he got louder as we went he was talking with his hands in an aggressive manner. You could tell he was agitated about our presence. You could see that he was getting angrier as we were there. After the ID team left, he was madder.

Q) His behavior (Pelham's) was or was not reasonable?

A) It was not, he wanted to argue with police about the fact we were checking him and that normally means there's a reason they don't want you to check them.

Q) During your assignment to the Superbowl detail, did you have any other similar interactions?

A) No Sir

Q) During your assignment to the Superbowl detail, did you have any interactions with people of other races?

A) Absolutely

#### Summary

In a Citizen Complaint dated February 1, 2019, Mr. Dwayne Pelham accused Cpl. Eddie Tompkins of racial profiling, discrimination and retaliation. Pelham's complaint centered around an interaction he had with Tompkins and other law enforcement officers on January 30, 2019.

The complaint investigation method involved; a review of Pelham's statement and an interview of Pelham, a review of approximately 23 minutes of body camera footage recorded by 4 different DNR Game Wardens who were present during the interaction and a review of written statements provided by the 4 Game Wardens present. Three of the Game Wardens were interviewed as witnesses by O'Neal. Tompkins was interviewed by O'Neal as the accused.

On January 30, 2019, Tompkins and other law enforcement officers, including 3 other GA DNR Game Wardens- Sgt. Lee Brown, GW Bobby Sanders and GW Joseph Cowart were assigned to;



Georgia Department of Natural Resources Law Enforcement Division Office of Professional Standards	Internal Affairs Investigation <u>Investigative Report</u> <b>UNFOUNDED</b>
Report completed by Lt. Henry S. O'Neal February 25, 2019	Cpl. Eddie Tompkins Racial profiling, discrimination, retaliation

provide high visibility security, support SAFE security and restrict access at the Superbowl event in Atlanta.

GW Bobby Sanders questioned Pelham about his presence alongside the CSX railroad tracks near the Baker Street Security Checkpoint. After a brief encounter with Pelham, Sanders reported the suspicious vehicle to the shift supervisor, Sgt. Brown. Brown and Tompkins responded to the scene to investigate. Upon their arrival, Tompkins was directed by Brown to speak with Pelham about his presence there.

The DNR supervisor on scene, Sgt. Lee Brown made the decision to notify COMMAND about the suspicious vehicle. Brown instructed another Game Warden, Joseph Cowart to make the notification when he arrived on scene prior to the interaction between Tompkins and Pelham. Brown made his decision based on where Pelham's truck was parked. Brown said he was concerned about where it was sitting and how it was sitting. Brown said it was suspicious that the vehicle was backed up at the base of a concrete parking deck. Brown said there was vehicle and pedestrian traffic in the area that he was concerned about. Brown said the vehicle being backed in could have indicated the driver was trying to conceal the tag. Brown also observed that it was a private vehicle, not a government vehicle and that it had a "Falcons decal" on the door. Additionally, the vehicle was not placarded which was required of all vehicles in the venue perimeter.

After the ID team screened Pelham and left the scene, Pelham approached the Game Wardens standing across the railroad tracks. On body camera footage, Pelham shook the officer's hands and said, "I have no ill feeling toward any of you. I can tell you that this whole situation should have never happened". Pelham then pointed at Tompkins and said, "I won't blame it on you cause you, you wasn't here and you got the picture all messed up, by the time you came over I was already upset." Tompkins then said, "I know, and I caught the brunt of that." Pelham then responded, "I hate for the fact you caught the brunt of that, but I can tell you right now, the way this all went down, that, that, be glad you ain't gonna have nothing to do with that".

When describing his encounter with Tompkins, Pelham told O'Neal, "I'm going to let you know, at this point, the niceness was over. I've already got my mind made up, if this guy (Tompkins) walks over and asks me for my credentials, a third time after they have already been checked twice (by SAFE and Sanders), then if he expects me to be nice, he can forget about that".

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O'Neal asked Pelham if Cpl. Tompkins was unfriendly or unprofessional during their encounter. Pelham responded, "You could call us both unprofessional, [but] there was no name calling or cursing". Pelham further stated that there were no racial slurs or abusive language used by Tompkins. In his complaint, Pelham used the words, intimidation, vindictive and malicious to describe Tompkins. Pelham said Tompkins intimidated him by calling the GBI bomb squad to the scene and that by calling the GBI, Tompkins was vindictive. When asked about Tompkins being malicious, Pelham said that though he was not harmed [by Tompkins], the GBI showed up after his encounter with Tompkins. Pelham said the encounter was done for no reason, and that nothing was done to him (such as being arrested).

Tompkins said he did not know that Pelham was black until he walked up to the vehicle and Pelham rolled the window down. Tompkins did not make the request for the ID team, they had already been requested as he approached the vehicle.

The investigation finds no cause to substantiate the allegations, the complaint on Tompkins is UNFOUNDED.

Nothing Further



